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No. _____

In The

Supreme Court of the United States

October Term, 1994

FUN 'N SUN RV, INC., et al.,

Petitioners,

v.

STATE OF MICHIGAN AND ACCIDENT FUND DIRECTOR, ACCIDENT FUND OF MICHIGAN, STATE ADMINISTRATIVE BOARD,

Respondents.

Petition For Writ Of Certiorari To The 30th Judicial Circuit/Court Of Claims, Ingham County, Michigan

PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

Under Sup.Ct.R. 14.1(a), Petitioner submits the following issues for review:

1. The Accident Fund was a privately funded workers' compensation insurance company operated by the State of Michigan. In a 1982 federal court lawsuit filed by its policyholders ("Members"), Michigan consented to judgment that the Fund's assets were held in trust for the Members, and that it held no financial interest in the Fund's assets. The Fund collected premiums under this consent judgment. Can Michigan now sell the Fund's assets and retain the sale proceeds without violating the United States Constitution's prohibition against taking property without just compensation or impairment of contract?

2. In all other cases, state courts of last resort have found that constitutional law prohibits a state from taking the assets of state-operated workers compensation funds where the employee members remained on the risk if the Fund's assets were insufficient. By statute and insurance policy provision, the Accident Fund's Members remained on the risk and Michigan was never at risk in the Fund's operation. Can Michigan now sell the Fund's assets, including the surplus, and retain the sale proceeds without violating the Constitution's prohibition against taking property without just compensation and impairment of contract?

3. By statute, Michigan had to place all Accident Fund policy premiums in a restricted account and was prohibited from spending such funds on any purpose but the Fund's operations or Members' dividends and refunds. In its insurance policies, the Fund promised to make dividends and

STATEMENT OF QUESTIONS PRESENTED FOR REVIEW – Continued

refunds and otherwise operate the Fund in accordance with state statute. By 1994, Michigan had collected over $150 million in premium surplus in this account. Can Michigan appropriate this surplus by selling it with the other Fund assets without violating the Constitution's prohibition against uncompensated takings and impairment of contract?

4. Michigan developed the Accident Fund's assets by collecting policy premiums under a statute that provided that the Ingham County Circuit Court would supervise the liquidation of the Fund if it were dissolved. This statute was interpreted to mean that any unnecessary assets would be returned to the Members in a Fund liquidation. Can Michigan now sell the Fund's assets and keep the proceeds without violating the Constitution's prohibition against uncompensated takings and impairment of contract?

5. Michigan charged the Accident Fund millions of dollars a year for administrative fees. Michigan "taxed" the Fund equivalent to the amount of state taxes it would have paid if it had been a "for-profit fund." Can Michigan now also take the Fund sales proceeds without violating the Constitution's prohibition against uncompensated takings and impairment of contract?

STATEMENT OF QUESTIONS PRESENTED FOR REVIEW – Continued

6. Michigan has accomplished an indirect taking of the Members' property rights without paying compensation. The Michigan Supreme Court by refusing to acknowledge vested rights because the Members' current property interest was to be redeemed in the future contravenes two United States Supreme Decisions. Is United States Supreme Court review warranted?

LIST OF PARTIES

Pursuant to Sup.Ct.R. 14.1(b), the following are parties in this action:

Plaintiffs:	FUN' N SUN R.V., INC. and JOHN CHAMBERLAIN CORP., on their own behalf and on behalf of two classes of Accident Fund of Michigan policyholders from 1988 to present.
Defendants:	State of Michigan, Accident Fund of Michigan, State Administrative Board, and Accident Fund Director, E.L. Cox.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Fun 'N Sun RV, Inc., et al., by and through their attorneys, Law, Weathers & Richardson of Grand Rapids, Michigan, hereby petitions the Court for a writ of certiorari so that the United States Supreme Court may review the questions presented for review for the reasons contained herein.

JURISDICTION AND OPINIONS BELOW

Petitioners, on their behalf and on behalf of two classes of similarly situated Accident Fund Members ("employer policyholders"), commenced action on September 21, 1993,

against Michigan and Accident Fund Director E. L. Cox in the Michigan Court of Claims, Case No. 93-15051-CM.[1]

The lawsuit asserted that the provisions in 1993 PA 195-200 ("Sale Legislation") appropriating the proceeds of the Accident Fund's sale violated the Members' federal and state constitutional rights against impairment of contracts and takings without just compensation.[2] Petitioners requested monetary damages and ancillary equitable and injunctive relief arising out of the Accident Fund's sale.

On November 1, 1993, the State Respondents moved for summary disposition asserting that there were no genuine issues of material fact. On March 9, 1994, the Court of Claims issued a written opinion denying the State's Motion to Dismiss, instead finding that given the Members' exclusive risk and existing state and national case law, the Members held a vested right in the Accident Fund's assets; that Michigan could not profit from sale of a Fund developed with private funds and in which it had no "known interest" or risk; and that if the Fund were sold, the proceeds would have to be distributed to the Members.[3]

Utilizing an unusual Michigan Court Rule, Governor John Engler responded to the Court of Claims' Opinion by sending an Executive Message to the Michigan Supreme Court on May 6, 1994, requesting that it review the following question:

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[1] The State Administrative Board and Accident Fund of Michigan were added as parties in the First Amended Complaint filed and served on April 4, 1994.

[2] In a second count, the Plaintiffs contend that the policyholders between January 1, 1988, and January 1, 1990, are entitled to a damage judgment in the amount of $21,457,846 plus interest as a result of the Insurance Commissioner's determination under Section 712 of 1990 PA 157, MCL 418.712 that such an amount should be escrowed for policyholder distribution as excess surplus. This claim does not involve the Accident Fund's sale or federal constitutional law.

[3] See A-1. (The citation form "A-___" refers to the page number in the appendix to this petition.)

> Is that portion of 1993 PA 198, i.e. MCL 418.701a; MSA 17.237(701a), which makes that consideration for the sale of the State Accident Fund the property of the state constitutional and in conformance with the law?

The Michigan Supreme Court issued an order on June 9, 1994, directing the parties to brief this issue as well as the constitutionality of MCL 418.701a(4); MSA 17.237(701a)(4) which purports to deprive the courts of jurisdiction to enjoin or restrain the sale of the Accident Fund.[4]

On December 30, 1994, the Michigan Supreme Court ruled. Four of the seven justices determined that the Members had no interest in the Fund because they could not compel any particular dividend or premium refund, and no statutory provision prior to the Sale Legislation addressed ownership rights in the proceeds if the Accident Fund was sold. The Majority Opinion stated that prior court opinions describing the Fund as a Policyholder "trust," including the federal court *Baerwaldt*[5] opinion did not use "trust" in a "legal" sense. The Opinion failed to address the consent judgment's provisions that the State had no financial interests in the Fund.[6]

Noting that the State had held no risk in operating the Fund and that the Fund had always been viewed as a Member "trust," Chief Justice Cavanaugh and Justice Levin dissented, finding that the Member beneficiaries held a vested right, which could not be liquidated without the payment of just

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[4] On May 25, 1994, the Plaintiffs moved the Court of Claims to enjoin the State of Michigan from accepting any of the proceeds from the Accident Fund and instead to escrow those funds with the Court of Claims pending resolution of this lawsuit in order to meet federal and state constitutional mandates that compensation be paid prior to any taking and in order to ensure that the Plaintiffs would receive the sale proceeds if they prevailed, given the ultimate inability of the courts to compel state payment of a judgment under MCL 600.6458. At a hearing on June 29, 1994, the Court of Claims refused to issue an injunction on the belief that Michigan would pay any damage award ultimately rendered in the case.

[5] See *infra* at p 11, fn 23.

[6] See A-14.

compensation. They expressly found that the State's taking of the sale proceeds violated the Members' state and federal constitutional rights.

The case was remanded to the Michigan Court of Claims for entry of judgment against the Members on their constitutional claims to the sale proceeds and the disposition of an unrelated state law claim.[7]

This Court has jurisdiction to grant the petition for writ of certiorari under 28 USC 1257(a), since the matter involves a state court of last resort's decision upholding a state statute against a federal constitutional challenge.

STATEMENT OF CASE (FACTS)

This case arises out of the sale of the Accident Fund of Michigan ("Accident Fund"). The Accident Fund was created in 1912 by the State of Michigan to provide workers' compensation insurance and employer's liability insurance for employers on a nonprofit basis.[8] At the time of its sale, the Accident Fund had an estimated 20,000 employer "members," most of which are small businesses, churches and nonprofit organizations.[9]

The Accident Fund was *exclusively* funded by insurance premiums collected from and paid by the Members, including Plaintiffs and other class members. By statute[10] and emboldened language in every policy issued by the Accident Fund, the State of Michigan assumed no liability for any Accident

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[7] The Michigan Supreme Court's decision on the federal constitutional issue should be viewed as final since further state proceedings on the Members' claim to the sale proceeds are "preordained" and since the "federal issue, finally decided by the highest court in the state, will survive and require decision regardless of the outcome of future state court proceedings." *Cox Broadcasting Corp.* v *Cohn*, 420 U.S. 469, 479, 480 (1975).

[8] MCL § 418.701; MSA § 17.237(701).

[9] The Accident Fund utilized the term "member" as opposed to "policyholder."

[10] MCL § 418.725; MSA § 17.237(725).

Fund obligation or any of its operations.[11] Rather, despite their premium payments, the Members remained responsible for the Accident Fund's liabilities, if its assets were insufficient. Such liability could manifest itself through additional premium "assessments" or through the Members' retained liability under the Workers' Compensation Disability Act, should their insurance be insufficient.

At sale time, the Accident Fund's assets included reserves set aside for the payment of claims, an office building with fixtures and equipment, and a cash surplus in excess of $150 million.

While providing that the Accident Fund was a state agency, administered by an Executive Director, Michigan law also stated that Michigan held the Fund's assets in trust for the exclusive benefit of its Members.[12] Indeed, in a prior federal court lawsuit between the State of Michigan and the Members on this issue, Michigan entered into a consent judgment expressly acknowledging that the assets of the Accident Fund belong to the Members and cannot be transferred to the State's General Fund.[13]

The Accident Fund's policies promised the Members that the Fund would be administered under the law governing the Fund, specifically promising that the Members would receive such dividends and premium refunds as provided by law. This language referred to two statutory provisions, one requiring that premiums be set as low as actuarially possible[14] and the other requiring all Fund monies to be deposited in a revolving fund to be used exclusively for operating activities and policy refunds and dividends.[15]

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[11] See facsimile Accident Fund policy attached as A-51.

[12] *Insurance Commissioner* v *Accident Fund*, 173 Mich App 588 (1988).

[13] See January 9, 1984, Consent Judgment in *Accident Fund* v *Baerwaldt*, W.D. Mich G81-224, attached as A-74.

[14] MCL § 418.711a; MSA § 17.237(711a).

[15] MCL § 418.746; MSA § 17.237(746).

Pursuant to state law, Michigan "taxed" the fund as if it were a for-profit entity with respect to state and local taxes and charged the fund millions of dollars each year for each service rendered by state officials such as those employed in the Attorney General and State Treasurer's offices.

Despite their responsibility to hold the Accident Fund's assets in trust, state officials explored in 1992 the prospects for liquidating the Accident Fund for the benefit of the State's General Fund. In late 1992 and early 1993, state officials met with at least one prospective buyer for the Accident Fund and ascertained that the Accident Fund had a market value in excess of $250 million.

Subsequently, the State Legislature designed a plan to eliminate the Members' rights to the Accident Fund's assets so that the Fund's sales proceeds would enure to Michigan's exclusive benefit. To implement such a plan, the State Legislature introduced a package of bills[16] (hereinafter collectively referred to as the "Sale Legislation") on January 26, 1993. The Sale Legislation's principal effect was to enable Michigan to sell the Accident Fund to a "for profit" Blue Cross and Blue Shield subsidiary, and for all sales proceeds to flow to Michigan's General Fund.[17]

Subsequent to the filing of this lawsuit, the State Legislature adopted the Sale Legislation which was signed into law on October 18, 1993, although it did not take effect until April 1, 1994.

On Wednesday, June 15, 1994, the Administrative Board publicly announced that it would sell the Accident Fund for $291 million to the "Blue Cross and Blue Shield subsidiary. While the liabilities of the Fund were to be assumed by the new entity, the Members would no longer have an interest in the Fund's assets or an exclusive entitlement to dividends or premium refunds flowing from its surpluses.

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[16] These bills became 1993 PA 195-200.

[17] MCL § 418.701a; MSA § 17.237(701a).

On December 28, 1994, Michigan closed the Fund sale and took possession of $291 million in cash. Two days later, the Michigan Supreme Court issued its decision.

LEGAL PROVISIONS INVOLVED

US Const, art I, § 10, states, in relevant part:

> "No State shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts . . . "

U.S. Const., Am.V. in relevant part:

> " . . . nor shall any person . . . be deprived in life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation."

Section 701a(2) of Michigan Accident Fund Sales Legislation:

> "Consideration in transaction; appropriation. (2) The consideration in the transaction referred to in subsection (1) shall be the property of the state of Michigan . . .

MCL 418.701a, MSA 17.237(701a).

ARGUMENT

INTRODUCTION

In the Bible, David coveted Bathsheba, wife of Uriah, a soldier in David's army. To fulfill his desire, David ordered his general to transfer Uriah to the front battle lines where he would likely be killed. The general dutifully obeyed and once Uriah was dead, David took Bathsheba to be one of his many wives.

In 1982, the Accident Fund members defeated the state of Michigan in federal district court by establishing that they, not Michigan, were the beneficial owners of the Accident Fund's assets, which were held in trust for them. Michigan nevertheless retained its ownership craving. In 1993, its legislature passed statutes ("Sales Legislation") directing the Accident Fund's state managers to sell the Fund to a private

bidder who would assume its operational assets and non-member liabilities. The legislation further provided that upon the sale closing, all statutes regarding the Accident Fund would be revoked, so that in that instant it would die and dissolve, leaving Michigan to walk from the closing possessing the sale proceeds as its own.

On December 28, 1994, Michigan sold the Accident Fund to a private "for-profit" subsidiary of Michigan Blue Cross and Blue Shield for $291 million. Two days later, on December 30, 1994, the Michigan Supreme Court dutifully held that the State could finally realize its asset ownership yearning and take the $291 million for its General Fund, because prior to the Sales Legislation no statute specifically allocated the proceeds in the event the Accident Fund was sold.

Like King David, Michigan is guilty of a taking through indirection. Michigan was prohibited by a consent judgment and statute from directly transferring the $150 million cash surplus and other assets in the Accident Fund to the State's General Fund. The issue here is whether Michigan can accomplish the same result indirectly by selling the Fund.

Many states operate nonprofit, employer-funded workers' compensation funds like the Accident Fund. The Accident Fund, like these other funds, was developed under case law holding that because the employers, not the state, remain on the risk, they, not the state, are the beneficial owners of the fund's assets. Such case law has uniformly held that a state taking of such assets without compensation violates constitutional prohibitions against impairment of contracts and uncompensated takings. By requiring vested rights to be immediately redeemable, the Michigan Supreme Court Opinion violates at least two opinions of this Court. Employers in Michigan's Accident Fund should not be subject to a different set of federal constitutional standards from employers using other states' funds.

On a broader level, this Court should take and reverse this case because a governmental disingenuity such as this corrodes public trust in government and is malignant to the Fifth and Fourteenth Amendments rights against governmental takings, rights which this Court recently reminded

state governments should be treated as respectfully as any other right in the Bill of Rights.[18]

I. MICHIGAN'S STATUTORY TAKING OF THE ACCIDENT FUND'S SALES PROCEEDS IMPAIRS THE MEMBERS' CONTRACTS AND TAKES THEIR PROPERTY RIGHTS WITHOUT JUST COMPENSATION IN VIOLATION OF THE UNITED STATES CONSTITUTION.

The Sales Legislation's Section 701a(2) provides:

> **Consideration in transaction; appropriation.** (2) The *consideration* in the transaction referred to in subsection (1) *shall be the property of the state of Michigan . . .* [19]

The Members acknowledge that Michigan had a right to sell the Accident Fund. The Members even acknowledge that Michigan could have *prospectively* changed the Accident Fund's property characteristics *for premiums and assets thereafter collected* and that such assets could have been sold for the State's benefit. However, Section 701a impairs the Members' current contractual rights and takes their existing property without just compensation in violation of the United States Constitution's 5th and 14th Amendments because the Accident Fund assets sold were developed:

> (1) under Michigan law providing that they were held in 'trust' for the benefit of the policyholders;
>
> (2) under a federal consent judgment providing that Michigan held no property interest in those assets whatsoever and could not profit from them;
>
> (3) under state statutes providing that the minimum premium possible would be changed and unnecessary surplus returned to the policyholders; and

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[18] *Dolan* v *City of Tigard*, 512 US ___; 114 S Ct 2309; 129 L Ed 2d 304 (1994).

[19] MCL 418.701a(2); MSA 17.237(701a(2)), (Emphasis added).

(4) under issued policies that promised the Members dividends and premium refunds according to such statutes.

A. The Sold Accident Fund's Assets (Including Surplus, Reserves, and Property) Were Being Held in Trust For Its Members

The very fact that the state legislature included Section 701a(2) in the Sales Legislation reveals its dubious validity. When the State sells its own property, it does not need to declare that the proceeds of the sale are its own. Likewise, since the State Legislature presumably does not pass needless legislation when it amends a statute, it is presumed that the Legislature intends a change.[20] Thus, without the language above, we can presume that the Accident Fund Sale proceeds would not have been State property.

Indeed, prior to the Michigan Supreme Court's challenged Opinion, Michigan law established that the Accident Fund's assets were held in trust for its Members' benefit, and could *not* be diverted to the Michigan's General Fund or otherwise used for state expenditures:

> Thus, while *the State of Michigan holds the assets of the Accident Fund in trust* and, though the Commissioner of Insurance and the State Treasurer, has control over those funds, *it can withdraw no money from the fund to use for any other state expenditure and those funds may only be expended to further the purpose of the Accident Fund.*[21]

The rationale of prior Michigan law was straightforward and logical. The heart of its reasoning lay in the fact the State has no liability for the Accident Fund's operations and, therefore, cannot not profit from its activities:

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[20] See *English* v *Saginaw County Treasurer*, 81 Mich App 626 (1978).

[21] *Insurance Commissioner* v *Accident Fund*, 173 Mich App 566, 588 (1988) (emphasis added).

> We interpret this provision to mean that just as the State does not subsidize the Accident Fund, neither can it receive any 'profits' from the fund to expend for other purposes . . . [22]

Federal precedent is even direct:

> The assets of the Accident Fund are held in *trust* by the Treasurer of the state of Michigan *for the benefit of the employer insureds*. Consequently, these monies are *not available for general or other purposes of the State of Michigan*, nor are they subject to appropriation by the legislature . . . [23]

The Western District Court of Michigan's published declaration was subsequently memorialized in a Consent Judgment:

> 2. This Court finds and declares that *the assets, monies and funds held for or by the Michigan State Accident Fund* (which Defendants [the Commissioner of Insurance et al] claim are public funds and Plaintiffs [the State Accident Fund] claim are private fund) *are trust funds, subject to special purposes as set forth in the Worker's Disability Compensation Act of 1969 and its amendments and the Insurance Code of 1956 and its amendments.*[24]

This rationale also fell four-square into the national body of law that has evolved to interpret the asset character of funds within publicly administered insurance pools. *Each* of these cases turn on whether the particular state's statutes release the employer upon the payment of premiums and expose the State's general fund for any subsequent deficiency or whether, conversely, the State's general fund is protected from exposure and the employers in the pool remain financially obligated to ensure its sufficiency.

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[22] *Insurance Commissioner, supra* at 588.

[23] *Accident Fund* v *Baerwaldt*, 545 F Supp 1030, 1037 (WD Mich, 1982).

[24] Consent Judgment, January 9, 1984, in *Accident Fund* v *Baerwaldt*, WD Mich G81-224; see A-74. (emphasis added).

State courts of last resort in Utah, Oklahoma, Nevada, Arkansas, Minnesota, Idaho and North Dakota have all held that their State-administered workers' compensation pools were "trusts," the assets of which were held for the benefit of the employers who contributed to the pool and could not be diverted to the state's general fund or for any other general state purpose without violating the constitutional edicts against taking without just compensation or impairment of contract.[25]

Typical is the reasoning of the Supreme Court of Utah which relied on the fact that the State of Utah was not liable for the obligations of the Fund, which obligations instead had to be carried by its members who therefore had an interest in insuring that the pool's fund were not diverted for general state purposes, but rather maintained to insure that reserves were adequate:

> The employer really pools his premiums in the State Fund to create a fund for the payment of an obligation for which it is liable. It is a common fund belonging to the participating employers. It is therefore not derived from anything owing to the state nor paid out on behalf of any state obligation . . . The fund is publicly administered, but its debtors are not debtors to the state. It belongs, not to the state, but to the contributing employers for their mutual benefit . . . while a public fund in the sense of being administered by a public body, is not public money in the sense that it is money of the state to be used for and on behalf of the state for a state expenditure * * * .

Chez v *Industrial Commission of Utah*, 62 P.2d 549 at 550-551 (Utah 1936).

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[25] *Chez* v *Industrial Commission of Utah*, 62 P2d 459 (Utah 1936); *Moran* v *State*, 534 P2d 1282 (Ok 1975); *State* v *McMillian*, 136 P 108 (Nev 1913); *McArthur* v *Smallwood*, 281 SW2d 428 (Ark 1955); *Senske* v *Fairmont & Waseca Canning*, 45 NW2d 640 (Minn 1951); *State* v *Musgrave*, 370 P2d 778 (Idaho 1962); *State* v *Olson*, 175 NW 714 (N.D. 1919).

Even where the state courts have rejected policyholders' claims to a fund's assets, the courts have utilized the same test and rationale. For example, in allowing the State of New York to transfer surplus in the state-administered insurance pool to New York State's general fund, the New York Courts relied upon the fact that employers in the State's Workers' Compensation pool could not be further assessed and were released from workers' compensation liability after paying their premiums, and that New York had by legislative amendment assumed responsibility for the liabilities of the Fund.[26]

The Michigan statutes enabling the Accident Fund contain features that unequivocally cast Michigan into the category of those states whose statutes create a trust fund for the benefit of the employers, rather than a state fund.

Michigan assumes no liability for the Accident Fund.[27] The Accident Fund not only has the right to charge premiums but also to "assess" members for deficiencies.[28] Moreover, Accident Fund membership does not absolve the employer of workers' compensation liability so that in the event of its insolvency the employer remains liable for workers' compensation benefits. Finally, in the event of the Accident Fund's dissolution, the Ingham County Circuit Court (not the State

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[26] *Methodist Hospital of Brooklyn* v *State Insurance Fund*, 476 NE2d 304, 309 (N.Y. 1985). A similar result has been reached in Ohio where the State operates an obligatory Fund that releases the employer from workers' compensation liability after payment of the premium and is notoriously under-funded, necessitating large, annual infusions of state tax dollars. See *State ex rel Williams* v *Industrial Commissioner of Ohio*, 156 NE 101 (Ohio 1927).

[27] MCL 418.701(1); MSA 17.237(701(1)).

[28] See MCL 418.701(1), MSA 17.237 (701(1)); MCL 418.711(a), MSA 17.237(711(a)); and MCL 418.715, MSA 17.237(715). See also OAG, 1919, p. 87 (November 13, 1918).

Legislature) is to assume responsibility for the distribution (not appropriation) of the Fund's assets.[29]

In 1990 PA 157, Michigan strengthened the Accident Fund's obligation to stand alone, independent of the State's financial resources. Not only did the Michigan State Legislature choose not to repeal Section 701(1), which states that the State is not liable for the fund, it took positive steps to reiterate and reinforce this feature of the Accident Fund. Section 725 requires the Accident Fund to distribute a policy document describing the rights and responsibilities under the policies. PA 157 amended Section 725 to require that the Accident Fund's policies, on the first page in 10-point type, state that the State of Michigan is *not* liable if the Accident Fund is declared insolvent.[30]

PA 157 imposed other conditions making the Accident Fund operate more like a private entity. It obligated the Fund to establish a 3.5 to 1 premium-to-surplus ratio,[31] and forced the Fund to pay fees to local units of government and to the State equivalent to the property taxes or state income, sales and single business taxes it would pay if completely private.[32]

Expressly relying on these statutory characteristics and precedent, the Court of Claims found that the State holds the assets of the Accident Fund in trust for the benefit of its policyholders, and cannot be taken under the federal constitution without just compensation. The Michigan Supreme Court's reversal is unprincipled, stands in stark contrast to all rulings of the other state courts to consider this issue, and subjects employers in Michigan to a different federal constitutional standard than applied in all other states.

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[29] MCL 418.751, MSA 17.237(751); MCL 418.725, MSA 17.237(725). In light of this section, the Michigan Attorney General has opined that the surplus must be distributed to the members of the Fund at that time. See OAG, 1919, p. 88 (November 15, 1919).

[30] See MCL 418.725, MSA 17.237(725) as amended by PA 1990, No. 157, Section 1, Imd. Eff. June 29, 1990.

[31] MCL 418.712, MSA 17.237(712).

[32] MCL 418.713, MSA 17.237(713).

B. The Sold Assets Were Subject to a Consent Judgment Providing That the State Had No Financial Interests in Them Whatsoever, Present or Latent, Except as Trustee

The present suit is not the first time the Members sued the State of Michigan over the ownership of the Accident Fund's assets. In 1982 the Members sued and firmly established by decree and then consent judgment not only that the Accident Fund was a "trust" for the employer's benefit, but also that the State had no financial interest whatsoever in the Accident Fund's assets except as Trustee. Even a casual review of the consent judgment reveals the thoroughness of the federal court's and parties' desire to defeat any state financial interest in the Accident Fund assets from whatever angle asserted:

> 4. *This Court finds and declares that the State of Michigan may not borrow or take the assets,* monies and funds held for or by the Michigan State Accident Fund, nor may any of those assets, monies and funds be placed into the State of Michigan general fund, or be used for purposes inconsistent with the Worker's Disability Compensation Act of 1969 and its amendments and the Insurance Code of 1956 and its amendments.
>
> 5. This Court finds and declares that the *State of Michigan has no known, ripe or outstanding claims to or equity interest, or any interest other than as trustee, in the assets, monies and funds held for or by the Michigan State Accident Fund* . . . [33]

Once a consent judgment has been entered, it has the full force and effect of a litigated judgment.[34] The State never sought relief from the judgment, nor has it been set aside,

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[33] A-76, 77, *Baerwaldt* consent judgment, (emphasis added).

[34] *Trendell* v *Solomon*, 178 Mich App 365 (1989).

reversed or vacated.[35] It therefore remains in full force and the State is estopped from denying the validity of its binding findings.[36]

C. The Sold Accident Fund's Assets Were Developed Under Statutes Obligating the State to Return To The Members Any Assets Not Necessary to the Operation of the Fund.

During the period of time the Members purchased their policies, three statutes were in effect, which, in working together, mandated that the Accident Fund return to the Members' monies unnecessary for the operation of the Accident Fund. This trilogy of statutes effectively controlled the beginning, middle and end of the Members' relationship with the Fund.

Section 711(a) applies to the beginning premium paid by the Member, providing that "premiums . . . shall be at the lowest level possible, consistent with sound insurance actuarial standards."[37]

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[35] See *Holt* v *Stofflet*, 338 Mich 115 (1953). See also, *Rosenbaum* v *Davis Iron Works, Inc.*, 669 F Supp 813 (ED Mich 1987).

[36] The Michigan Supreme Court dismissed the consent judgment on the basis that the suit was eventually dismissed. See Supreme Court Op, p.6, n.9. In fact, there were two issues involved in the federal suit: the asset ownership issue which had federal constitutional implications and involved the State and Members and whether the Members Advisory Board or State could manage the day-to-day operations of the fund, a state law question involving that Board and the State. Once the federal court disposed of the "ownership" issue in a final judgment, the Members dropped out of the suit. The federal court properly abstained on the "management" issue, and dismissed the "remaining portion" of the case. In fact, the eventual dismissal order *only* involved the Accident Fund as a party defendant. Clearly, the consent judgment remained effective as a final disposition of the "ownership" issue between the State and Members. It has never been set aside, vacated or reversed. See A-___, docket sheet and November 1990 order dismissing the case against the Accident Fund.

[37] MCL 418.711(a), MSA 17.237(711a).

Section 746 controlled the ongoing operational use of the Members' premiums. Section 746(1) uses the obligatory term "shall" in describing the Accident Fund Executive Director's duty to place all Accident Fund premiums in a revolving fund that must be used exclusively for nine enumerated purposes. The first seven of those enumerated purposes are designed to ensure that the Accident Fund met its operational duties and responsibilities. The last two address distributions of the enumerated purposes, funds unnecessary to meet the Accident Fund's liability. These two purposes enure directly and exclusively to the benefit of the Members, since they consist of premium refunds or dividends.

The exclusive purposes of this revolving fund do not include a diversion or transfer to the State's general fund, whether directly or indirectly, and, in fact, do not allow any distribution other than for the liabilities of the fund or distributions to the Members:

> (1) The executive director shall maintain a revolving fund derived from premiums collected from members of the fund. The revolving fund shall be used exclusively for the following purposes:
>
> (a) Payment, handling, and servicing of claims.
>
> (b) Payment of fees imposed by this act or as otherwise provided by law.
>
> (c) Insurance expenses, including agent's commissions.
>
> (d) The operating budget of the fund.
>
> (e) Investments.
>
> (f) Transactions with the Michigan workers compensation placement facility.
>
> (g) Reinsurance.
>
> **(h) Refunds of premiums or applicant's funds.**
>
> **(i) Dividends and similar payments to policyholders.**

MCL 418.746, MSA 17.237(746) (emphasis added).

Finally, Section 751 covers the end of the Members' relationship with the Fund, establishing that the Ingham

County Court must supervise the distribution of the Accident Fund's assets in the event of a dissolution which is what effectively happened through the sale.[38] Section 751 mandates that the Ingham County Circuit Court supervise the distribution of the Accident Fund's assets under such circumstances. While it does not specify in detail the order of distribution, the provisions of Section 746 would seemingly mandate that the circuit court first make sure that any injured workers' compensation claims were first paid out of the assets and any remaining, unnecessary funds would be refunded to the Members as dividends or premium refunds, such as provided by Section 746.

Indeed, the Genesee County Circuit Court in *Solomon* v *Michigan State Accident Fund*, Case No. 84-75763-CZ, whose ruling the State asked the Michigan Supreme Court to accept, found that the Members had a vested, future interest in the proceeds of the Accident Fund upon its dissolution as a trust, expressly relying upon Section 751.[39]

D. The Sold Accident Fund Assets Were Developed Under Policy Provisions That Incorporate the Members' Right to Receive Dividends and Premium Refunds as Provided by Law

Michigan statutes governing the Accident Fund required that it issue policies defining the Members' rights.[40] Incorporating the revolving fund provisions of Section 746 under and dissolution provisions of Section 751, the Members' Accident Fund Policies expressly refer to a right to receive dividends:

> Upon issuance of this policy, it's a result of you having request a membership and coverage in writing, you are a member of the Accident Fund of Michigan while this policy is enforced. As a Member you will receive any dividends declared on this

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[38] MCL 418.751, MSA 17.237(751).

[39] See A-86.

[40] MCL 418.725, MSA 17.237(725).

policy in accordance with the provisions of applicable law.[41]

Members paid their premiums in good faith reliance that the Accident Fund would honor this policy promise and remit any Member funded surplus as provided in Section 746. Furthermore, Members paid their premiums in reliance upon Section 751's promise that upon dissolution of the fund, as occurred when it was sold, those proceeds that are unnecessary to meet the liabilities of the Fund would be distributed to the Members under the guidance of the Ingham County Circuit Court.

E. Section 701a Impairs the Members' Contractual Rights in the Accident Fund Assets Sold

US Const, art I, § 10, states, in part:

"No State shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts . . . "

The Michigan Supreme Court Opinion noted that the Contract Clause's purpose is to protect bargains reached by parties by prohibiting states from enacting laws that interfere with pre-existing contractual arrangements.[42] This Court has established a three-prong test for impairment claims, which the Michigan Supreme Court attempted to apply: (1) substantial contractual impairment; (2) legislative disruption must be "necessary to the public good"; (3) and the means chosen to address the public need are reasonable.[43]

Citing this Court's precedent, the Michigan Supreme Court admitted that a "contractual" right subject to this constitutional clause could be created by consensual contract or by statute, if the language and circumstances demonstrate a legislative intent to create private rights of a contractual

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[41] See A-67.

[42] Mich Supreme Court Op, p 10, citing *Allied Structural Steel Co* v *Spannaus*, 438 US 234, 242, 98 S Ct 2716; 57 LEd 2d 727 (1978).

[43] *Allied*, 438 at 244, 247.

nature enforceable against the State, and then retroactively modified them.[44]

The Michigan Supreme Court discontinued its analysis after the first prong, finding no substantial impairment of contract. This was clear error because the Members held contractual rights by statute and consensual agreement.

The Michigan Court found no legislative intent to create a contract by distinguishing Michigan's Accident Fund Legislation from Oregon's statutes governing a similar fund. The Michigan Supreme Court noted that unlike Michigan's legislation, Oregon statutes contain an express provision stating that Oregon had no proprietary interest in the fund:

> The former provision disclaiming Oregon's interest in the fund, ORS 656.634, had declared in part that the state 'has no proprietary interest in the Industrial Accident Fund' and denied 'any right of reclamation it may have had in that fund.' The subsequent Transfer Act included language repealing the disclaimer of interest. Insofar as the transfer provision retroactively amended preexisting contracts as established by the disclaimer, the court ruled the transfer provision violated the contract clause of Oregon's constitution. 306 Or 399.[45]

In truth, this feature does not distinguish Oregon's Accident Fund from Michigan's Accident Fund, nor Michigan law from Oregon law. It is a feature they share. As noted *infra* at p. 15, the Michigan Accident Fund assets sold were procured under federal consent judgment provisions containing virtually the same language as the Oregon statute, and certainly expressing the same intent; namely, that Michigan holds no current or latent proprietary interest in the Accident Fund whatsoever and would, therefore, be uninfluenced by its own corporate gain in operating the fund.[46]

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[44] Michigan Supreme Court Op, p 12, citing *United States Trust* v *New Jersey*, 431 US 1, 17, n14; 97 S Ct 1505; 52 L Ed 2d 92 (1977).

[45] See A-27.

[46] See A-76, 77.

Michigan's consent judgment endorsement that it held no financial interest in the Accident Fund assets created an enforceable legal obligation, as surely, if not more certainly, than the Oregon Legislature's statutory proclamation to the same effect. After all, what is the purpose of a consent judgment if not to create an enforceable legal obligation.

Several other features of the Accident Fund confirm the intent to create a binding financial obligation. Each year, the state fully reimbursed itself millions of dollars for Attorney General's services and investment services provided by the State Treasurer. Moreover, by statute, the State forced the Accident Fund to pay fees to local units of government and to the State equivalent to the property taxes or state income, sales and single business taxes it would pay if completely private.[47]

Michigan does not charge public funds "fees" for services nor does it "tax" them. The flip-side of conferring such rights on itself is that it saddled itself with an intent that the Accident Fund assets were "private" in character. For Michigan to sell the Fund, and then walk away with the proceeds constitutes a triple dip, absolutely inconsistent with its past actions and the proprietary interest that the Members expected in the Fund based on statute and interpretive law.

Finally, as fully described *infra* at pp. 18-19, the fact that the Accident Fund issued policies that expressly promised distributions in accordance with such "law," stands as an independent, consensual commitment that the Members, not the State, would receive the benefit of any distribution, including distribution on dissolution. The State's taking, therefore, is an actionable impairment of the Members' policy rights to distributions.[48]

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[47] MCL § 418.713, MSA § 17.237(713).

[48] The other two prongs of the impairment test have significance in "regulatory" settings, but are minimally important where the State impairment is designed to benefit the State's corporate interest:

> In applying this standard, however, complete deference to a legislative assessment of reasonableness and necessity is not

F. Section 701a Constitutes a Taking Violating the Members' Rights Under the 5th and 14th Amendments

The Fifth Amendment provides in part:

> nor shall any person . . . be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation.[49]

The Governor's Message to the Michigan Supreme Court acknowledged that the Michigan Legislature was already "spending" the Accident Fund proceeds on a variety of "public uses," and Section 701a is, without a doubt, a "taking." The question is whether it took despite the Members' vested property rights.

This Court has defined a "vested property right" as a secured benefit stemming from an independent source such as a contract or state law.[50] The Michigan Supreme Court relied on its definition in *Minty* v *Board of State Auditors*, 336 Mich 370, 390 (1953) that a vested right must be "something more than such a mere expectation as may be based upon an anticipated continuance of the present general laws; it must

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> appropriate because the State's self-interest is at stake. A governmental entity can always find a use for extra money, especially when taxes do not have to be raised. If a State could reduce its financial obligations whenever it wanted to spend the money for what it regarded as an important public purpose, the Contract Clause would provide no protection at all. *United States Trust*, 431 US at 26.

The *U.S. Trust* test is easily met here, where the Governor himself in his message to the Michigan Supreme Court noted that the purpose of the "impairment" was so that the Legislature could spend the liquidated assets on wholly unrelated public projects. See A-100.

[49] The Fifth Amendment applies to the states through the Fourteenth Amendment. *Penn Central Transportation* v *New York City*, 438 US 104, 122; 98 S Ct 2646; 57 L Ed 2d 631 (1978).

[50] *Board of Regents* v *Roth*, 408 US 564, 577 (1972).

have become a title, legal or equitable to the present or future enjoyment of property . . . "

In the present case, the Michigan Supreme Court found no vested right because the Members received the workers' compensation insurance they paid for, the Members could not control distributions, and the Members could not expect the Accident Fund statutes to continue unamended. The Michigan Supreme Court misstated and misunderstood the Members' claims.

The Members, like the policyholders in other states where a trust has been recognized, do not only contract for workers' compensation and business liability coverages. They also contract for an administration of the fund or pool under the provisions of the Enabling Act, including provisions promising the lowest premium possible, prohibiting the State from profiting from the fund and entitling them to the exclusive non-claim distributions whether by dividend, premium refund or liquidation. In short, they contract for the maintenance of a trust with respect to assets developed with premiums collected under these conditions.

The Members' claim is analogous to the Plaintiffs' claim in *Lynch* v *United States*, 292 US 571, 579, 54 S Ct 840, 78 LEd 1434 (1934). *Lynch* involved insurance contracts entered into between individuals and the federal government. The policies were for yearly renewable term life insurance, and were issued during World War I, pursuant to the War Risk Insurance Act.

In particular, the insurance policies required the government to pay the premiums of the policyholders who were disabled during the war. The plaintiffs in *Lynch* were policyholders who were disabled, and thus entitled to have their policy premiums paid for the rest of their lives. During the depression, the government sought to eliminate this obligation by repealing all laws granting or pertaining to yearly renewable term insurance.

This Court held that the policies were contracts, and that the insureds paid prescribed monthly premiums in consideration for the insurance obligation taken on by the government.

This Court further held that the due process clause prohibited the government from abrogating the premium payment expectation, unless the action fell within the police power or another paramount power of the state. On that score, the Court held that there was no valid police power excuse, since Congress was merely seeking to cut its budget expenditures:

> But Congress was without power to reduce expenditures by abrogating contractual obligations of the United States. To abrogate contracts, in the attempt to lessen government expenditure, would be not the practice of economy, but an act of repudiation. 'The United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a State or a municipality or a citizen.[51]

Although in this case we have a government trying to raise money through a taking instead of eliminating an expenditure, the motivation is the same; namely, ease in budgeting for general governmental expenses. As in *Lynch*, the method is the same; namely, a statutory repeal. Moreover, as in *Lynch*, the plaintiffs' objection is the same, namely, it is wrong to take away existing rights to fund general governmental activities, an objection even strengthened here because, unlike in *Lynch*, the assets to fund the future benefit were already at hand.

The Michigan Supreme Court denigrated the Members' exclusive distribution right by suggesting that even though existent, it was completely discretionary with the Executive Director. Even if the Members could not control surplus distributions, this fact would *not* be dispositive of the vested-right issue. The Michigan Supreme Court itself has noted that whether there is a "vested right" should not turn on the right

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[51] *Lynch*, 292 US at 580.

of control.[52] If it did, then no trust beneficiary could ever be said to have a vested right.

The Michigan Supreme Court's apparent view that a distribution right must be immediately redeemable before a vested right is created conflicts with this Court's holding in *Webb's Fabulous Pharmacies, Inc.* v *Beckwith*.[53] In *Webb's*, Florida tried to appropriate the interest that was earned on an interpleader fund while it was held by the circuit court. A Florida statute authorized the Circuit court to charge a fee for its services in administering the fund. Florida passed another statute authorizing the court to keep all of the interest earned on the fund.

The Florida Supreme Court upheld the statute, reasoning that the fund was public money as long as the clerk held the money, and the state was only appropriating what it created. This Court, however, reversed the Florida court, holding that the Webb creditors held a proprietary interest in the fund because it was created with private monies and was held for their eventual benefit:

> It was property held only for the ultimate benefit of Webb's creditors, not for the benefit of the court and not for the benefit of the county. And it was held only for the purpose of making a fair distribution among those creditors. Eventually, and inevitably, that fund, less proper charges authorized by the court, would be distributed among the creditors as their claims were recognized by the court. The creditors thus had a state-created property right to their respective portions of the fund.[54]

Like the Florida Supreme Court in *Webb's*, the Michigan Supreme Court grossly understated the nature of the Accident Fund and the rights conferred to the Members in Section 746.

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[52] *Grubaugh* v *City of St. Johns*, 384 Mich 165, 171 (1970).

[53] 449 US 155, 66 L Ed 2d 358, 101 S Ct 446 (1980).

[54] *Webb's*, 449 US at 161.

As in the Florida interpleader fund, no state funds were used to create the Accident fund. As with the Florida interpleader fund, Michigan was paid handsomely for services it rendered to the Fund. Like the Florida interpleader fund, the Accident Fund may be publicly administered, but it was private in character.[55]

Likewise, while the Executive Director was given latitude in deploying Accident Fund resources among the enumerated Section 746 categories, the categories themselves were exclusive and mandatory. Thus, even until the sale closing date, Section 746 conferred in the Members the right to block any direct transfer of the assets sold, including the $150 million cash surplus to the State.

The Members could have also compelled a distribution under certain circumstances. Section 711a required the Fund to charge the Members the lowest premium possible. Section 746's nondistribution categories are all designed to ensure that the Accident Fund is self-supporting. If the Executive Director abused his discretion and refused to make dividend distributions or premium refunds when there was an insufficient operating reason for retaining such funds, the Members could compel the dividends or premium distributions, a point conceded by Michigan in its brief to the Michigan Supreme Court.[56]

Moreover, as noted previously, the Members contracted with the expectation that if the Accident Fund is to be dissolved, which is what happened at the proposed sale, the Ingham County Circuit Court must supervise the distribution of its assets, first towards payment of any insured workers'

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[55] In fact, the present case is more compelling than *Webb's*. In its management of the Fund, Michigan was never on the risk and the Fund paid fees on its assets to the State in lieu of taxes.

[56] Page 13 of the State of Michigan's Michigan Supreme Court Brief cites *In re Butterfield Estate*, 418 Mich 241, 263 (1983), for this proposition.

compensation claims and then to its Members pursuant to Section 751.[57]

The fact that these interests might be realized in the future is not destructive of a vested right. After all, the Michigan Supreme Court in *Roth*, and *Minty*, and this Court in *Webb's*, expressly note that future rights drawn upon law or governmental rule can be vested rights:

> It is true, of course, that none of the creditor claimants had any right to the deposited fund until their claims were recognized and distribution was ordered. [citation omitted] *That lack of immediate right, however, does not automatically bar a claimant ultimately determined to be entitled to all or a share of the fund from claiming a proper share of the interest, the fruit of the fund's use, that is realized in the interim.*[58]

The plain fact is that like any other trust-creating document, the Accident Fund policies, statutes and interpretive law established that the Fund assets were held in trust, with specific guidelines on how the trustee was to distribute the funds during the life of the trust and with provisions for the distribution of the funds to the beneficiaries upon dissolution.

Finally, it is simply unfair for the Michigan Supreme Court to suggest that the Members were arguing that Michigan could not amend its statutes. The Members even acknowledged that Michigan could have changed the character of the Fund prospectively by putting itself on the risk and repealing the premium and distribution rights in Sections 711a, 746 and 751. Assets developed under the new laws might thereafter be taken without due process. However, as this court definitely ruled in *Webb's*, Michigan may not retroactively define interests in assets developed under contrary expectations without

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[57] This expectation was grounded in law through *Solomon, supra* and fact. See John Emerick Affidavit attached as A-96.

[58] *Webb's*, 449 US 161-162 (emphasis added).

violating the Members' rights to due process and just compensation:[59]

> Neither the Florida Legislature by statute, nor the Florida courts by judicial decree, may accomplish the result the county seeks simply by recharacterizing the principal as 'public money' because it is held termporarily by the court. The earnings of a fund are incidents of ownership of the fund itself and are property just as the fund itself is property. The state statute has the practical effect of appropriating for the county the value of the use of the fund for the period in which it is held in the registry.
>
> *To put it another way: a state, by ipse dixit, may not transform private property into public property without compensation,* even for the limited duration of the deposit in court.[60]

Likewise, the state of Michigan is not entitled by ipse dixit to transform the Accident Fund's reserves, equity and surplus from private property into public property by legislation, sale or other artifice.

II. THIS COURT SHOULD REVIEW THIS CASE BECAUSE FEDERAL CONSTITUTIONAL LAW SHOULD CLEARLY PRECLUDE TAKINGS BY INDIRECTION AND THE MICHIGAN SUPREME COURT'S OPINION CONFLICTS WITH THIS COURT'S PRECEDENT

Sup.Ct.R.10.1(c) suggests that this Court will review a state court decision on an important question of federal law which has not been settled by this Court.

The Accident Fund Enabling Legislation's Section 746 and the *Baerwaldt* federal consent judgment precluded a

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[59] See also *Karl* v *Bryant Air Conditioning*, 416 Mich 558 (1982); *Minty* v *Board of State Auditors*, 336 Mich 370 (1953), which recognize that statutory amendments that revoke existing entitlements constitute a retroactive taking.

[60] *Webb's*, 449 US at 164 (emphasis added).

transfer of surplus directly to Michigan's General Fund. The Michigan Supreme Court, however, blessed Section 701a's accomplishment of the same result through an intermediate sale device. To the best of this counsel's research, this Court has never firmly pronounced that takings by indirection are as infirm under the 5th and 14th Amendments as takings by direct action. This Court should take this case in order to define federal law on this important point. Otherwise governmental entities will be encouraged to use disingenuous means to achieve their takings, a development that can only further erode public trust and confidence in government.

Sup. Ct. R. 10.1(c) also suggests that this Court will accept a case where a state court decision decides a federal question in a way that conflicts with applicable decisions of this Court.

As noted previously, the Michigan Supreme Court's finding that the Michigan State Legislature had a right to statutorily abrogate the Member's proprietary interest in the Accident Fund, conflicts with this Court's opinion in *Lynch*, *supra*.

As previously discussed, the Michigan Supreme Court's opinion that the Members held no vested right in the Accident Fund because they could not compel a present distribution from the Section 746 revolving fund, which was held for their exclusive benefit, conflicts with this Court decision in *Webb's*, *supra*. Accordingly, a review of the case is appropriate.

CONCLUSION

John Emerick owns a real estate company in Saginaw, Michigan. When he read about the state-taking of the Accident Fund's sale proceeds in the newspaper, he was shocked and outraged. According to Mr. Emerick, the Michigan's taking is absolutely inconsistent with the representations made to him regarding the Accident Fund by those who sold him his Accident Fund policies.[61] Mr. Emerick's expectations

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[61] See A-96.

are firmly founded in his Accident Fund policies, Michigan case law, the *Baerwaldt* federal consent judgment and the national body of case law defining proprietary interest in state operated workers' compensation funds.

In *Dolan*, this Court reminded governmental units that vested property rights were as important as the civil rights guaranteed elsewhere in the Bill of Rights, and cautioned that statutory changes which extinguish private rights for purposes of raising general public revenue would be scrupulously reviewed.

By indirectly taking the Accident Fund's privately funded assets for general public purposes, Michigan could not have more clearly ignored the instructions of the *Dolan*, violated the precepts of *Lynch* and *Webb's*, and disregarded the national body of case law which has uniformly delineated public and private rights in this type of fund. It also could not have more clearly denied the reasonable expectations of Mr. Emerick and 15,000 other business owners doing business in Michigan, expectations only this Court can now enforce.

Respectfully submitted,

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STATE OF MICHIGAN
IN THE COURT OF CLAIMS

FUN 'N SUN R.V., INC.,
and John Chamberlain Corp.,
on their own behalf and on behalf of a class of State Accident Fund policyholders from 1988 to present,

Plaintiffs,

V

STATE OF MICHIGAN,
and
Accident Fund Director E.L. Cox.,

Defendants.

File No.
93-15051-CM

Hon. Thomas L. Brown

OPINION AND ORDER

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This matter is before the Court on Defendants' motion for summary disposition pursuant to MCR 2.116(C)(8) and (10), in that Plaintiffs' have failed to state a claim on which relief can be granted, and that except as to the amount of damages, there is no genuine issue as to any material fact, and Defendant is entitled to judgment as a matter of law.

This case is brought by the Plaintiffs', policy holders of the Accident Fund MCL 418.701 *et seq;* MSA 17.237(701) *et seq,* alleging that they and other similarly situated policyholders are the owners of the surplus funds in excess of those required to cover the Accident Fund's liabilities, appropriate reserves and operating costs. That is, the State holds the funds in the Accident Fund in trust for the policyholders themselves and the

policyholders are entitled to receive any surplus and profit of the potential sale of the Accident Fund.

The issue presented in this case is whether the assets of the Accident Fund are held in trust for the policy holders, thus enabling them to obtain the surplus generated by the sale of Accident Fund. The Michigan Court of Appeals in *Commissioner of Insurance* v *Advisory Board of the Michigan State Accident Fund*, 173 Mich App 566; 434 NW2d 433, 1v den 433 Mich 872 (1988), held that the State Accident Fund is an agency of the state, and that the state holds the funds accumulated in the Accident Fund in trust. In so holding, the Michigan Court of Appeals stated at 588:

> Clearly under the statute, the Commissioner of Insurance, acting in concert with the State Treasurer, has the authority to hold the funds of the Accident Fund and to invest those funds. MCL 418.705; MSA 17.237(705); see also McAvoy, supra at 450 (state control over Second Injury Fund). However, it must also be noted that MCL 418.711; MSA 17.237(711) provides that the Accident Fund shall be neither more nor less than self-supporting. We interpret this provision to mean that just as the state does not subsidize the Accident Fund, neither can it receive any "profits" from the fund to expend for other purposes. Thus, while the state of Michigan holds the assets of the Accident Fund in Trust and, through the Commissioner of Insurance and the State Treasurer, has control over those funds and the authority to invest the funds, it can withdraw no money from the fund to use for any other state expenditures and those funds may

only be expended to further the purpose of the Accident Fund.

Moreover, in the case of *Accident Fund* v *Baerwaldt*, WD G81-224 (1984) in the United States District Court for the Western District of Michigan, although dismissed on abstention grounds, because the determination of whether the Accident Fund as a state agency is a question of state law [See *Accident Fund* v *Baerwaldt*, 579 F Supp 729 (1984)], the Court finds the Federal Court's determination to be indicative of how the assets of the Accident Fund are to be construed. While the Parties differ on the effect of the dismissal on the consent judgment entered in that case, the Court finds the case instructive to the issues presented in this case. The consent judgment entered in that case states in pertinent part:

> 2. This Court finds and declares that the assets, monies and funds held for or by the Michigan State Accident Fund are trust funds, subject to special purposes as set forth in the Worker's Disability Compensation Act of 1969 and its amendments and the insurance Code of 1956 and its amendments.
>
> * * *
>
> 4. This Court finds and declares that the State of Michigan may not borrow or take assets, monies and funds held for or by the Michigan State Accident Fund, nor may any of those assets, monies and funds be placed into the State of Michigan general fund, or be used for purposes inconsistent with the Worker's Disability Compensation Act of 1969 and its amendments and the Insurance Code of 1956 and its amendments. By stipulation of the parties, upon the dissolution of the Michigan State

> Accident Fund, the assets, monies and funds held for or by the Michigan Accident Fund shall be subject to disposition under the direction of the Ingham County Circuit Court, as provided by law. . . .
>
> 5. This Court finds and declares that the State of Michigan has no known, ripe or outstanding claims to or equity interest, or any interest other than as trustee, in the assets, monies and funds held for or by the Michigan accident Fund.

Therefore, it can be concluded that the Accident Fund's assets are held in trust for the policyholders themselves. This can be concluded by the aforementioned case law and the Accident Fund statute itself.

MCL 418.701; MSA 17.237(701) states the voluntary nature of the contributions to the Accident Fund. Said statute states in pertinent part:

> Upon compliance with the rules concerning insurance adopted by the commissioner, membership in and coverage by the fund shall be provided to employers subject to this act who shall request such membership and coverage of the fund in writing. Thereupon the accident fund shall assume charge of levying and collecting from employers such premiums or assessments as may be necessary from time to time to pay the sums which become due under the provisions of this act and also the expense of administration; and shall disburse such sums in accordance with the provisions of this act.

Thus, membership in the Accident Fund is voluntary and the payments made are not a "tax" but are "premiums" voluntarily paid into the Accident Fund. This

conclusion is buttressed by the fact that the State of Michigan does not infuse money into the Accident Fund, and is not liable if the funds available to the Accident Fund are inadequate. MCL 418.701; MSA 17.237(701) states that "[n]either the commissioner nor the state shall be liable or responsible for payment of claims for compensation under the provisions of this act beyond the extent of the sums so collected and received." Therefore, the Court finds that Defendants' argument that the asserts of the Accident Fund are not held in trust specifically for its members is without merit.

It is the opinion of the Court that the State holds the assets of the Accident in trust for the benefit of the policyholders. This trust would extend to any surplus generated from the activities of the Accident Fund. This is what the Michigan Court of Appeals meant when it used the term "assets" of the Accident Fund in *Commissioner of Insurance* supra. Clearly, any surplus generated by the Accident Fund based on the voluntary payments by the policy holders is an "asset."

The next issue is whether the trust aspects of the Accident Fund survived the 1990 PA 157 Amendments. The Court finds that it does.

Under the amended version of the Accident Fund, the Accident Fund was transferred to Department of Commerce where it would operate as an autonomous entity. MCL 418-701(1); MSA 17.237(701)(1). Moreover, an executive officer of the Accident Fund was created to act as the executive director of the Accident Fund and who is appointed by the governor. MCL 418.701(2); MSA

17.237(701)(2). This executive director replaced the commissioner of insurance in operating the fund and states that the executive director and the state treasurer act together in the investment of the balance of the amount [sic] money received after a sufficient amount of money is maintained to cover current losses and expenses of the Accident Fund. MCL 418.705; MSA 17.237(705).

But the most important aspect of the 1990 Amendments was the repeal of MCL 418.711; MSA 17.237(711) which held that the accident fund "shall be neither more or less than self-supporting and the premiums or assessments levied for such purpose shall be subject to readjustment by the commissioner as may become necessary."

Defendant alleges that this language was the basis for the Michigan Court of Appeal's decision in *Commissioner of Insurance* supra, and as a result of the reappeal, the trust aspect of the Accident Fund was altered and resulted in the State becoming more entwined with the Accident Fund. Defendants' cite State Fiscal Agency Analysis, SB 885 (as enrolled), October 25, 1990 page 6 as support, which states in pertinent part:

> The bill will result in an annual net cost to the State of approximately $610,000, and increase the annual revenue of local governments by approximately $500,000. Also, the bill shifts approximately $100,000 per year from the Accident Fund to the State General Fund, shifts annually an indeterminate amount of money from the fund to a new Workplace Health and Safety Fund, and provided for a one-time shift of $5,683,846 from the Fund to an escrow account and the Workplace Health and Safety Fund.

However, the Court finds that the character of the Accident Fund was not changed by the 1990 Amendments. Specifically, the 1990 Amendments did not repeal MCL 418.701(1); MSA 17.237(701)(1) which provides that the state is not liable or responsible for payment of claims against the Accident Fund when those funds are inadequate to pay said claims. Further, MCL 418.725; MSA 17.237(725), reenforces this fact by stating that each policy issues shall state in ten point type a statement that the "Michigan state accident fund is an agency of state government and is not a member of the property and casualty guaranty association, and that nether [sic] the state nor the association is liable if the state accident fund is declared insolvent during the effective period of the policy." Moreover, the 1990 Amendments did not repeal MCL 418.751; MSA 17.237(751) which requires that if the Accident Fund is dissolved it must be done under the direction of the circuit court.

Therefore, Court finds that although MCL 418.711; MSA 17.237(711) was repealed, that fact alone does not destroy the trust aspect of the Accident Fund. The Court finds that the basic character of the Accident Fund was not altered by the 1990 amendments. Moreover, the Court finds that the case of *McAvoy* v *HB Sherman Co*, 401 Mich 419; 258 NW2d 414 (1977), cited by Defendants as support of their contention that the surplus of the Accident Fund is state moneys is without merit.

The issue in *McAvoy* pertained to the reimbursement by the Second Accident Fund to carriers for benefits wrongly paid out and not by the recipients of the wrongly paid out funds through the operation of the no-

stay provision of MCL 418.862; MSA 17.237(862). In finding that there was no confiscatory taking, the Michigan Supreme Court held at 450-451:

> The Second Injury Fund is a state insurance created by the Legislature to insure carriers and self-insured employers against certain losses occurring due to worker's compensation claims. * * * The Second Injury Fund does not belong to the carriers. No employer or carrier has a direct or vested interest in the fund. Rather, the carriers and self-insured employers pay annual assessments to the fund. Once paid, theses [sic] assessments become state or public moneys. Like any insurance scheme, the Second Accident Fund spreads the risks of worker's compensation among all the self-insured employers and carriers.
>
> It would be improper to conclude that because self-insured employers and carriers are required by law to pay into the fund, reimbursements received from the fund constitute "self-reimbursement." * * * Since the Second Injury Fund is a creature of the state, no property right would inure to the employers or carriers.

The basic difference between the Accident Fund and the Second Injury Fund is that the latter's members are required by law to pay into the fund, whereas the policyholders of the Accident Fund voluntarily join the Accident Fund, thus, making the Michigan Supreme Court's holding inapplicable to this case.

The Court agrees with Plaintiffs that the case of *Moran* v *State Ex Rel Derryberry*, 534 P2d 1282 (1975), is instructive to the issue now before the Court. In *Moran* the Supreme Court of Oklahoma dealt with the issue of

the status of the State Insurance Fund (which is similar to Michigan's Accident Fund), the legal nature of its funds, including reserve funds, and the right of the State, acting through the Legislature, to take and use these funds.

In holding that the funds are held in trust for the benefit of the policyholders of that states' version of the Accident Fund, the Oklahoma Supreme Court citing *Chez* v *Industrial Commission of Utah*, 90 Utah 447; 62 P2d 549 (1936), stated at 1287:

> The Court held that a debt owing the Fund was not an obligation due the State, and in doing so determined the status or nature of the funds (premiums) received from employers, stating (62 P.2d p. 550), "The employer really pools his premiums in the State Fund to create a fund for the payment of an obligation for which it is liable. It is a common fund belonging to the participating employers. It is therefore not derived from anything owing to the state nor paid out on behalf of any state obligation," and at page 551, "The fund is publicly administered, but its debtors are not debtors to the state. It belongs, not to the state, but to the contributing employers for their mutual benefit." The court (p. 551) concluded that the State Insurance Fund, "while a public fund in the sense of being administered by a public body, it is not public money in the sense that it is money of the state to be used for and on behalf of the state for a state expenditure * * * ."

In conclusion the Oklahoma Supreme Court found that "[t]he employers had a vested legal right, when they entered into the insurance contracts with the Fund and

paid the premiums, to rely upon this trust being maintained and administered in accordance with the State Insurance Fund Act, supra, and the law applicable thereto." The Court agrees with this conclusion and finds that the policyholders of the Accident Fund have a vested right to the assets, monies and surpluses of the Accident Fund and hereby DENIES Defendants' motion for summary disposition as to this issue.

In Count II Plaintiffs' seek declaratory relief and damages for the State's specific failure to return the funds in the 1986-1989 statutory escrow to the members during those years. Plaintiffs' specifically allege that pursuant to MCL 418.712; MSA 17.237(712), Defendants were required to establish a special escrow account (the 1986-1989 escrow account) into which all the surplus of the Accident Fund at the end of the second calendar quarter in 1990. Plaintiffs' allege that the surplus generated was in excess of $21,000,000, but only $5,700,000 was transferred into the escrow account. Further, that this amount was not used to payoff [sic] policyholders claims as was Defendants prerogative, but has transferred the amount to the Accident Fund's General fund in violation of MCL 418.712(3)(b); MSA 17.237(712)(3)(b). Plaintiffs' allege that the true value of the surplus was in excess of $21,000,000, not $5,700,000, and that the transfer into the Accident Fund's General Account was improper.

MCL 418.712(1); MSA 17.237(712)(1), governs the determination and reduction of the surplus and states in pertinent part:

> (1) The Insurance Commissioner shall make a determination of the amount of surplus of the

> Accident Fund existing at the end of the calendar quarter in which the effective date of the amendatory act that added this Section occurs. After the determination is made, the Commissioner shall require a reduction in surplus not later than sixty days after the date of this determination so that the State Accident Fund will have a net written premium to surplus ration of 3.5 to 1. The amount of premium shall be determined at the end of the first quarter of 1990 based on the previous twelve months.

Specifically, Plaintiffs' argue that the effective date of the amendatory act was June 29, 1990 and the appropriate quarter ended on June 30, 1990; These dates are not disputed by Defendants. Further, that pursuant to MCL 418.712(1); MSA 17.237(712)(1) the Insurance Commissioner shall reduce the surplus not later than 60 days after that date, so that the Accident Fund will have a net written premium surplus ratio of 3.5 to 1. Further, the Insurance Commissioner determined the excess surplus on August 15, 1990 to be $21,457,846 and as of that date, the Insurance Commissioner's duties pursuant to MCL 418.712(1); MSA 17.237(712)(1) was completed.

Defendant argues that the $21,457,846 was erroneous, because it was not actuarial [sic] accurate and was amended to reflect the correct actuarial information on October 17, 1990. The amended surplus was determined to be $50,690,494 with an excess surplus calculated as $5,683,846.

The Court finds that the language in MCL 418.712(1); MSA 17.237(712)(1), states that the "commissioner *shall* require a reduction in surplus not later than 60 days after the date of this determination . . . " The word "shall"

makes it mandatory on the insurance commissioner to perform the act of reducing the surplus by the 3.5 to 1 ratio in order to determine the excess surplus within the 60 day period so proscribed. Had the legislature meant to allow the Insurance Commissioner to amend the determination after the proscribed date, the legislature would have used the term "may" or stated words to that effect. Therefore, the Court denies Defendants' motion as to this portion of Count II.

Next Plaintiff alleges that there is a question of fact as to when the escrow account created under MCL 418.712(2); MSA 17.237(712)(2), was transferred to the Accident Fund and to whether it was transferred to cover qualifying liabilities.

MCL 418.712(2); MSA 17.237(712)(2) states in pertinent part:

> (2) The amount of surplus in excess of that determined pursuant to Subsection (1) shall be deposited in a separate account to be held in escrow for a period of five years after the date of the determination or eighteen months after the last court action is settled, whichever is earlier. Except as otherwise provided in this subsection, this escrow account shall be used only for the purpose of covering the liability of the accident fund arising from claims or obligations against the State Accident Fund either pending on the effective described in this section . . .

The Court has reviewed the Parties briefs and exhibits, and finds that Plaintiff is correct in that there is a question of material fact as to the dispersal of the funds

at issue and therefore denies Defendant's motion as to the remaining portion of Count II.

THEREFORE, the Court DENIES Defendants' motion for summary disposition.

/s/ Thomas L. Brown
Thomas L. Brown, Circuit Judge

Date: 3-9-94

Michigan Supreme Court
Lansing, Michigan 48909

Opinion
Chief Justice
Michael P. Cavanagh

Associate Justices
Charles L. Levin
James H. Brickley
Patricia J. Boyle
Dorothy Comstock Riley
Robert P. Griffin
Conrad L. Mallett, Jr.

FILED DECEMBER 30, 1994

In re Certified Question

FUN 'N SUN RV, INC, and JOHN CHAMBERLAIN CORP, on their own behalf and on behalf of two classes of Accident Fund of Michigan policyholders from 1988 to present,

Plaintiffs,

v

No. 99561

STATE OF MICHIGAN, ACCIDENT FUND OF MICHIGAN, STATE ADMINISTRATIVE BOARD, and ACCIDENT FUND DIRECTOR E L COX,

Defendants.

BEFORE THE ENTIRE BENCH (except RILEY, J.).

GRIFFIN, J.

This matter is before us as the result of an executive message of Governor John M. Engler dated May 6, 1994, in which he requested this Court, pursuant to MCR 7.305(A), to address and resolve the question:

> Is that portion of 1993 PA 198; i.e. MCL 418.701a; MSA 17.237(701a), which makes that consideration for the sale of the State Accident Fund the property of the state, constitutional and in conformance with the law?

Having granted the request, 446 Mich 1201 (1994), we now answer that the challenged portion of the statute is constitutional.[1]

I

Underlying the certified question presented in the instant case is a lawsuit, *Fun 'N Sun RV, Inc* v *Michigan*, filed September 21, 1993, in the Court of Claims by two Accident Fund policyholders.[2] They allege, inter alia, that they and other similarly situated policyholders are owners of any surplus accumulated by the fund in excess of the amount needed to cover liabilities, that the fund's

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[1] In addition to argument provided by the parties in *Fun 'N Sun RV, Inc* v *Michigan*, which followed our order granting the Governor's request, we had the benefit of briefing by the parties before the issuance of the grant order. Unpublished order of June 9, 1994.

[2] Plaintiffs filed a parallel action in the Ingham Circuit Court that was dismissed on the ground that the Court of Claims had exclusive jurisdiction.

assets are held by the state in trust for the policyholders, and that the policyholders are entitled to distribution of any surplus or profit of a potential sale of the fund by the state.[3]

While this suit and a motion for summary disposition filed by the defendants were pending, the Legislature passed, and on October 19, 1993, the Governor signed, a series of bills that became effective April 1, 1994, as 1993 PA 195-200.[4] Of particular significance for purposes of the matter before us is 1993 PA 198, now § 701a of the Worker's Disability Compensation Act, MCL 418.101 *et seq.*, MSA 17.237(101) *et seq.*, which declares in part:

> (1) The state administrative board . . . may authorize the executive director of the state accident fund to enter into and consummate, under terms and conditions approved by the state administrative board, an agreement in the name of the state of Michigan for the sale of all or substantially all of the assets of the state accident fund to a permitted transferee, and

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[3] Plaintiffs also asserted, on behalf of a more limited class, a claim that the state inadequately complied with the § 712 requirement of a one-time distribution of excess surplus to 1986-89 policyholders.

[4] Plaintiffs filed a first amended complaint on May 31, 1994, adding count III. Count III alleges that the state's retention of the proceeds of the sale violates their property rights without due process as guaranteed by Const 1963, art 1, § 17 and US Const, Am XIV. Further, count III alleges that the retention of the proceeds impairs an obligation of contract in violation of Const 1963, art 1, § 10.

> assumption of all or substantially all of the liabilities of the state accident fund by the permitted transferee subject to the following conditions:
>
> * * *
>
> (2) The consideration in the transaction . . . shall be he property of the state of Michigan.

On March 9, 1994, the Court of Claims issued an opinion denying defendants' motion for summary disposition. Relying primarily on *Comm'r of Ins* v *Advisory Bd of the Michigan State Accident Fund*, 173 Mich App 566; 434 NW2d 433 (1988), the court concluded that "the policyholders of the Accident Fund have a vested right to the assets, monies and surpluses of the Accident Fund. . . . "

On June 15, 1994, the State Administrative Board announced its approval of an agreement for the sale and transfer of the fund's assets and liabilities to Blue Cross and Blue Shield of Michigan for consideration in the sum of $291,000,000.

One provision of the legislation authorizing such a sale, § 701a(2), provides that except for one percent to be used for winding up the affairs of the Accident Fund, the consideration received by the state is to go into the "rainy day fund" established pursuant to § 351 of 1984 PA 431. Another provision indicates that any agreement for sale of the Accident Fund, § 701a(3)(a), is be consummated by December 31, 1994, 1993 PA 198, § (3)(1).

Before turning to the arguments presented in support of plaintiffs' challenge to the constitutionality of 1993 PA

198, MCL 418.701a; MSA 17.237(701a),[5] an overview of the historical context preceding this dispute is provided to aid our analysis.

II

In 1912, worker's disability compensation was first adopted and implemented in this state. The original legislation included provisions to establish the Accident Fund as an optional source from which employers could obtain liability insurance.[6] The Accident Fund was to be administered by the Commissioner of Insurance under a statutory directive that the fund be "neither more nor less than self-supporting. . . . " *Id.* In 1917, an advisory board nominated by the policyholders was established to "advise with the Commissioner of Insurance as to the means and methods of administering the affairs of said accident fund. . . . "[7] 1917 PA 206, § 13.

In 1969, the original legislation, as amended, was repealed and replaced by MCL 418.701 *et seq.*; MSA 17.237(701) *et seq.* as part of a general revision of worker's

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[5] While claiming that the assets of the fund are held in trust, plaintiffs have not directly challenged the authority of the state to sell the fund. Moreover, there appears to be no controversy in this case concerning the value of the assets of the fund or the sale price.

[6] 1912 PA (1st Ex Sess) 10, pt V, the predecessor to the Worker's Disability Compensation Act, MCL 418.101 *et seq.*; MSA 17.237(101) *et seq.*

[7] The 1917 PA 206, § 12 enactment provided for an annual election by policyholders of a board consisting of employer members for two-year terms. Almost identical provisions are currently found at MCL 418.755; MSA 17.237(755).

compensation law. The basic statutory framework relating to the fund remained intact, including the mandate that its purpose was not profit making, but to be neither more nor less than self-supporting.

In 1976, the Attorney General issued an opinion, stating that the Accident Fund is a state agency and that the fund's employees are subject to civil service classification.[8] Instead of settling a dispute, the opinion seemed to revitalize a continuing controversy between the Commissioner of Insurance and the Advisory Board over who had control of the Accident Fund.

In 1981, the Advisory Board filed a suit in federal district court against the Commissioner of Insurance, seeking a ruling that the fund was not a state agency. *Accident Fund* v *Baerwaldt*, WD Mich, Case No. G81-224 (1982). The board did not prevail on this issue; however, several policyholders who joined in the suit as plaintiffs enjoyed more success with their claim that the assets of the fund were held in trust and could not be taken by the state for general purposes. In a consent judgment, the commissioner agreed that under the then-existing statutory scheme the "assets, monies and funds held for or by the Michigan State Accident Fund" could not be borrowed, taken, or placed in the general fund by the state, or "used for purposes inconsistent with the Worker's Disability Compensation Act of 1969 and is amendments. . . ."[9]

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[8] OAG, 1975-76, No 5,147, p 695 (December 7, 1976).

[9] The consent judgment also recited that the state of Michigan "has no known, ripe or outstanding claims to or equity

More litigation followed in 1983, when the Commissioner of Insurance filed a suit, which, among other things, challenged the authority of the Advisory Board to increase rates without his approval. However, the central issue presented for review to the Court of Appeals in *Comm'r of Ins, supra,* was whether the Accident Fund is a state agency.

The Court of Appeals held that the fund is a state agency and that it is not a mutual insurance company. The Court determined that the fund was subject to the supervisory and administrative control of the Commissioner of Insurance and that its employees were entitled to civil service classification. The Court also addressed a counterclaim of the Advisory Board that the state has no equity interest, or interest other than as trustee, in the fund's monies, reserves, or surplus. Referring to two statutory provisions in the WDCA, §§ 705[10] and 711, the Court of Appeals stated:

> Clearly, under the statute, the Commissioner of Insurance, acting in concert with the

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interest, or any interest other than as trustee, in the assets, monies and funds held for or by the Michigan State Accident Fund." Eventually, this suit was dismissed on abstention grounds. *Accident Fund* v *Baerwaldt,* 579 F Supp 729 (WD Mich, 1984), aff'd without published opinion 767 F2d 919 (1985), cert den 474 US 1020 (1985).

[10] Section 705 provides:

There shall be maintained in the accident fund a sufficient amount of cash to pay losses and expenses and the balance may be invested by the executive director of the state accident fund and the state treasurer acting together, in such securities as are specified by law for investment by casualty insurance companies.

> State Treasurer, has the authority to hold the funds of the Accident Fund and to invest those funds. MCL 418.705; MSA 17.237(705); see also *McAvoy* [v *HB Sherman Co*, 401 Mich 419, 450; 258 NW2d 414 (1977)] (state control over Second Injury Fund). However, it must also be noted that MCL 418.711; MSA 17.237(711) provides that the Accident Fund shall be neither more nor less than self-supporting. We interpret *this provision* to mean that just as the state does not subsidize the Accident Fund, neither can it receive any "profits" from the fund to expend for other purposes. Thus, while the State of Michigan holds the assets of the Accident Fund *in trust* and, through the Commissioner of Insurance and the State Treasurer, has control over those funds and the authority to invest the funds, it can withdraw no money from the fund to use for any other state expenditures and *those funds may only be expended to further the purpose of the Accident Fund.* [173 Mich App 588 (emphasis added).][11]

At the time the fund was created, and until as recently as 1990, § 711 provided direction that the Accident Fund was to be "neither more nor less than self-supporting. . . . " However, in 1990, comprehensive

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[11] The Advisory Board applied to this Court for leave to appeal the rulings of the Court of Appeals concerning designation of the fund as a state instrumentality, the subjection of the employees to civil service, and the authority of the Insurance Commissioner to set rates. Neither party sought to appeal the ruling respecting the state's interest in the fund's surplus or other assets. Leave to appeal was denied, with Justices Brickley and Boyle indicating they would have granted the application. 433 Mich 872 (1989).

changes were made by enactment of legislation, the described purpose of which was to put "the Fund on an equal footing with private insurers in the marketplace and ensure that it did not compete unfairly with them."[12]

In addition to repealing § 711 (which required the fund "to be neither more nor less than self-supporting"), enactment of 1990 PA 157 effected a number of fundamental changes in the structure and operation of the Accident Fund. The act, inter alia, (1) made the Accident Fund an "autonomous entity in the department of commerce"; (2) provided for an executive director to be appointed by the Governor for a four-year term; (3) added § 711a, which substituted for § 711 a provision that rates were to be as low as possible consistent with sound actuarial standards; (4) included a new § 712, providing for a one-time distribution of excess surplus to holders of policies during the period 1986 through 1989; and (5) required payment to the state and local governments of certain fees in lieu of taxes.

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[12] Senate Legislative Analysis, SB 885, June 19, 1990. As introduced, SB 885 was designed to privatize the fund. The original bill included provisions declaring that "the Fund would be neither an agency nor instrumentality of the State" and that "[a]ssets of the Fund would accrue to the benefit of the member employers." However, these provisions were rejected by the Senate Committee on Human Resources, which reported a version of the bill that contained no reference to privatization. Senate Legislative Analysis, SB 885 (as introduced), April 3, 1990.

III

The arguments of plaintiffs in *Fun 'N Sun* can be grouped under two constitutional headings: impairment of an obligation of contract, and deprivation of property without compensation. While these are separate theories, each requires that plaintiffs demonstrate ownership of specific contract rights or property rights. Without such a demonstration, there can be no impairment or deprivation. We hold that plaintiffs have no such contract or property rights. We first consider the impairment of contract claim.

IV

Plaintiffs assert that they have a contractual right to the accumulated surplus reserves. Further, they claim that this "right" will be unconstitutionally impaired if the state is permitted to retain the proceeds obtained from the proposed sale by operation of § 701a(2). It is plaintiffs' position that implicit in statutory provisions in effect when the policies in question were purchased was a contractual promise that premiums would remain as low as possible. It would then follow that there should not have been any accumulation of surplus reserves. According to plaintiffs' interpretation, surplus reserves should have been returned to the policyholders either in the form of reduced premiums or dividends. Plaintiffs rely on specific sections of the WDCA, §§ 711a, 712, 746, and 751, which shall be addressed seriatim, after we provide a brief summary of the law on impairment of contract and contract rights arising from statutes.

A

Both the federal and state constitutions prohibit the enactment of state law that impairs existing, contractual obligations. US Const, art I, § 10; Const 1963, art 1, § 10. The language contained in our state constitution, virtually identical to that used in the federal constitution, provides: "No bill of attainder, ex post facto law or law impairing the obligation of contract shall be enacted."[13]

It has been said that the purpose of the Contract Clause is to protect bargains reached by parties by prohibiting states from enacting laws that interfere with preexisting contractual arrangements. *Allied Structural Steel Co* v *Spannaus*, 438 US 234, 242; 98 S Ct 2716; 57 L Ed 2d 727 (1978).

In examining a claim that a state law impairs an existing contract, the United States Supreme Court has adopted a three-pronged test, with the first prong being a determination "whether the state law has, in fact, operated as a substantial impairment of a contractual relationship." *Id.*, p 244; *Romein* v *General Motors Corp*, 436 Mich 515; 462 NW2d 555 (1990). The second prong requires that the legislative disruption of contract expectancies be necessary to the public good, and the third prong requires

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[13] US Const, art I, § 10 states, in part, "No State shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility."

Plaintiffs have not argued, nor have we discovered, any basis in this case for finding greater protection under the state constitution than under the federal constitution for either constitutional claim. See *Sitz* v *Dep't of State Police*, 443 Mich 744; 506 NW2d 209, (1993).

that the means chosen by the Legislature to address the public need are reasonable. *Allied, supra,* p 247, citing *United States Trust Co* v *New Jersey,* 431 US 1, 23; 97 S Ct 1505; 52 L Ed 2d 92 (1977); *Romein, supra,* pp 535-536.

Because plaintiffs claim that the state law regarding the sale of the fund impairs the contract they had by operation of previously enacted legislation, we must address the first prong of the test for impairment of contract and determine what contractual rights, if any, the previous legislation established.

"Courts usually have concluded that a state contractual obligation arises from legislation only if the legislature has unambiguously expressed an intention to create the obligation. See, e.g., *Charles River Bridge* v *Warren Bridge,* 36 US (11 Pet) 420, 544; 9 L Ed 773 (1837); *United States Trust Co* v *New Jersey,* 431 US 1, 17, n 14; 97 S Ct 1505; 52 L Ed 2d 92 (1977). . . . " *Eckles* v *State,* 306 Or 380, 390-391; 760 P2d 846 (1988). In order to prove that a statutory provision has formed the basis of a contract, the language employed in the statute must be "plain and susceptible of no other reasonable construction" than that the Legislature intended to be bound to a contract. *Stanislaus Co* v *San Joaquin & King's River Canal & Irrigation Co,* 192 US 201, 208; 24 S Ct 241; 48 L Ed 406 (1904). As a general rule, vested rights are not created by a statute that is later revoked or modified by the Legislature if "the Legislature did not covenant not to amend the legislation." *Franks* v *White Pine Copper Div,* 422 Mich 636, 654; 375 NW2d 715 (1985). Yet, a statute can create a contract if the language and circumstances demonstrate a clear expression of legislative intent to create private rights of a contractual nature enforceable against the state. *United*

States Trust v *New Jersey, supra,* p 17, n 14; *Blue Cross & Blue Shield of Michigan* v *Governor,* 422 Mich 1; 367 NW2d 1 (1985).

Pertinent examples of statutory provisions that do, and do not, rise to the level of contractual obligations are found in the Oregon Supreme Court case of *Eckles, supra.* That case involved Oregon's Industrial Accident Fund (IAF), which is much like Michigan's Accident Fund. In 1982, the Oregon Legislative Assembly declared that the IAF had a surplus of $168 million and passed a "Transfer Act" to appropriate $81 million of that to the Oregon general fund. 306 Or 382. An employer insured by the fund brought suit to declare the legislation void on a number of grounds, including impairment of contract. Like this case, the employer did not rely on the actual contract of insurance, but a claim that certain portions of the Oregon worker's compensation statute were a contractual obligation.[14]

Among provisions in the Oregon statute was Or Rev Stat 656.634(1), which indicated, in part, "The Industrial Accident Fund is a trust fund exclusively for the uses and purposes declared in [ORS 656.001 to 656.794, the Oregon worker's compensation statute]. . . . " The Oregon

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[14] The *Eckles* court observed that the allegations in that suit did not allege an impairment of the contract between the State Accident Insurance Fund Corporation (SAIF) and the employer. "Plaintiff does not point to any obligation of SAIF that SAIF has been excused from performing by virtue of the Act." 306 Or 389. Rather, if any obligation was impaired, it was an obligation of the state. Similarly, plaintiffs in *Fun 'N Sun* do not allege that they will not receive the full insurance for which they have contracted with the Accident Fund.

Supreme Court stated, "[I]f the Legislative Assembly had simply provided in ORS 656.634 that the IAF was to be used for the purposes stated in ORS 656.001 to 656.794, a contractual obligation probably could not have been inferred from the provision because it would have contained nothing indicative of a legislative commitment not to repeal or amend the statute in the future." 306 Or 391, citing *Methodist Hosp of Brooklyn* v *State Ins Fund*, 64 NY2d 365, 377-378; 476 NE2d 304 (1985) (the statutory directives, regarding proper uses of an insurance fund did not create a contractual obligation).

However, given the existence at the time the plaintiffs purchased their policies of a statute specifically disclaiming Oregon's proprietary interest in the fund, ORS 656.634, § (2), the *Eckles* court had "little doubt" that the provision "expressed a contractual promise of the state to employers who insured with SAIF that the state would not transfer IAF funds to the General Fund." 306 Or 393.

The former provision disclaiming Oregon's interest in the fund, ORS 656.634, had declared in part that the state "has no proprietary interest in the Industrial Accident Fund" and denied "any right of reclamation it may have had in that fund." The subsequent Transfer Act included language repealing the disclaimer of interest. Insofar as the transfer provision retroactively amended preexisting contracts as established by the disclaimer, the court ruled the transfer provision violated the contract clause of Oregon's constitution. 306 Or 399.

However, the subsequent repeal of the disclaimer meant employers who purchased policies after the repeal

could not claim their contracts were impaired by operation of the provisions to transfer funds from the IAF to the general fund. *Id.*

We now turn to the specific statutory provisions relied on by plaintiffs.

B

Beginning with § 711a of the 1990 amendments, plaintiffs claim that their policies were purchased with the understanding that surplus would be distributed to policyholders either in the form of reduced premiums or dividends. Section 711a provides that "premiums . . . shall be at the lowest level possible, consistent with sound insurance actuarial standards." This provision was enacted at the time the break-even provisions of § 711 were repealed. Section 711a was in effect when the policyholders in question purchased their policies. Plaintiffs assert, in effect, that § 711a's requirement to keep premiums low amounted to a promise not to pass § 701a(2), which gave rise to the certified question before us.

There is no mention in § 711a of a possible sale of the Accident Fund. Nor is there any suggestion who would own the proceeds of such a sale. Thus, there is no clear expression of legislative intent in § 711a regarding ownership of the assets of the Accident Fund. As was true in *Eckles, supra,* there is no contract on this point between the policyholders and the state.

While we agree with plaintiffs in their assertion that the terms of contract in this case are not necessarily

limited to the face of the policy, we do not find in § 711a any express promise by the Legislature not to change the policy terms for future purchasers.

Another reason we cannot accept plaintiffs' argument that § 711a created as implied contractual right of the policyholders to excess surplus is because in the same 1990 act that adopted § 711a, the Legislature created a limited right to excess surplus in § 712. We now turn to plaintiffs' next argument based on § 712.

C

Plaintiffs maintain that the enactment of § 712 in 1990 meant the fund was obliged to maintain excess reserves at a ratio of 3.5 to 1, net written premium to surplus, and to distribute any excess surplus to policyholders.[15] We disagree.

Section 712(1) provides:

> The insurance commissioner shall make a determination of the amount of surplus of the accident fund existing at the end of the calendar quarter in which the effective date of the amendatory act that added this section occurs. After the determination is made, the commissioner shall require a reduction in surplus not later than 60 days after the date of this determination so that the state accident fund will have a net written premium to surplus ratio of 3.5 to 1. The amount of premium shall be determined at the

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[15] This ratio means that for every $3.50 collected in net written premium, one dollar is set aside for reserves over and above those necessary to pay known liabilities.

end of the first quarter of 1990 based on the previous 12 months.

We interpret the 1990 legislation as a provision for a one-time payment to 1986-89 policyholders of the balance left after surplus was reduced to a "net written premium to surplus ratio of 3.5 to 1" at the end of the calendar quarter in which the amendment went into effect. There was, and is, no provision in the act requiring future adjustment of surplus reserves. Section 712(1) obliged the state only to set the ratio of net written premium to surplus at 3.5 to 1. Future determinations of the surplus to premium ratio after the funds were placed in escrow were left to the discretion of the Commissioner of Insurance.

D

Plaintiffs interpret § 746 of the WDCA as implicitly granting policyholders ownership rights in surplus reserves.[16] However, there is no language in this section

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[16] Section 746 of the WDCA provides in pertinent part:

(1) The executive director shall maintain a revolving fund derived from premiums collected from members of the fund. The revolving fund shall be used exclusively for the following purposes:

(a) Payment, handling, and servicing of claims.

(b) Payment of fees imposed by this act or as otherwise provided by law.

(c) Insurance expenses, including agent's commissions.

(d) The operating budget of the fund.

(e) Investments.

to vest any policyholder with the right to a dividend or reduced premium. Section 746 merely provides that the executive director shall maintain a revolving fund derived from premiums, and that the fund is to be used only for nine enumerated purposes. The purposes include refunding premiums and issuing dividends.

Section 746 establishes the mechanism for the disbursement of funds. Should a dividend be declared by the executive director, § 746 allows disbursement without an appropriation from the Legislature. However, whether dividends are declared remains discretionary under § 715.[17]

Section 746 will not be violated by the sale and transfer of the fund. Plaintiffs have not alleged any misuse of premiums by the executive director. The premiums collected to date will be transferred intact by the terms of the sale. See MCL 418.701a; MSA 17.237(701a). All liabilities will be assumed by the purchaser. 1993 PA 200, i.e. MCL 500.5106; MSA 24.15106. All surplus will remain in reserve.[18]

(f) Transactions with the Michigan workers compensation placement facility.

(g) Reinsurance.

(h) Refunds of premiums or applicant's funds.

(i) Dividends and similar payments to policyholders.

[17] See n 26 and accompanying text.

[18] In fact, the terms, of the purchase agreement call for more surplus to be set aside by the purchaser to reach and maintain a ratio of 1.5:1, net written premiums to surplus.

We find the rationale of the highest court in New York State to be persuasive when it ruled on the constitutionality of the transfer of $190 million from the State Insurance Fund to the state's general fund.[19] *Methodist Hosp, supra.* Presented with a claim that the reserves of the state insurance fund were held in trust for the benefit of policyholders by operation of a low premium statute similar to our § 711a, the *Methodist Hosp* court concluded that there was no impairment of contract.

In *Methodist Hosp,* the plaintiff relied in part on the last sentence of the New York Workers' Compensation Law, § 76(1), which provided, "Such funds shall be applicable to the payment of losses sustained on account of insurance, to the payment of expenses in the manner provided in this chapter and to the payment of premiums for reinsurance in any insurance corporation of the whole or any part of any policy obligations." As here, the policyholder argued that the limited list of permissible use of fund monies implied "a legislative intent that policyholders have a property interest in its surplus." 64 NW2d 376. The New York Court of Appeals answered that the provisions "simply do not deal with what is to be done with surplus. . . . " 64 NY2d 376-377. The court concluded that the language used by its legislature evidenced legislative policy, not legislative intent to be bound in a contract. As such, the statute did not support plaintiffs' interpretation that a contract was intended.

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[19] The New York legislation provided that the State Insurance Fund would be paid back, but reappropriated annually to the general fund. The transfer occurs without interest being paid to the State Insurance fund. *Methodist Hosp, supra,* p 372.

Methodist Hosp, supra, p 377, citing *Methodist Hosp of Brooklyn* v *State Ins Fund,* 102 AD2d 367, 378-379; 479 NYS2d 11 (1984).[20]

Absent an explicit expression of the Legislature's intention that premiums collected and not used to pay liabilities either would earn interest or be refunded, we cannot read §§ 711a(1), 712, and 746, either separately or together, as so promising.[21] The language of § 746 is an expression of general policy. It is not a covenant between the state and policyholders for a specific premium.[22]

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[20] The Oregon Supreme Court applied similar reasoning in *Eckles, supra.*

[21] We reject plaintiffs' assertion that *Methodist Hosp* should be distinguished on the basis that the State of New York is ultimately liable should the state insurance fund assets be insufficient to pay claims, whereas the State of Michigan has structured its accident fund in a manner that does not expose the state's general fund to the risk of insolvency.

Nongovernmental persons legitimately shield themselves from liability by use of corporate structures. Individuals own corporations. Corporations own subsidiaries. No one would argue that the owner of a corporation is not the owner just because the owner is not liable for the corporation's debts. Similarly, plaintiffs show no reason why the State of Michigan should not be able to create and own an entity for a specific purpose and not be liable for its debts. Yet, that is the effect of plaintiffs' argument.

[22] Section 715 of the WDCA leaves the determination of premium rates to the discretion of the Commissioner of Insurance when it provides in pertinent part:

> Subject to chapter 24 of the insurance code of 1956, . . . being sections 500.2400 to 500.2484 of the Michigan Compiled Laws, the executive director may . . . prescribe when and in what manner the premiums and assessments shall be paid, may change

E

Plaintiffs likewise assert that § 751 of the WDCA creates contractual rights that control the disposition of fund assets.[23] Section 751 provides that the Ingham Circuit Court will dispose of Accident Fund monies if chapter 7 of the WDCA is repealed or the commissioner deems it necessary to dissolve the fund. We reject this argument for three reasons. First, there is no indication in the section of a promise by the Legislature not to amend it. Second, § 751 makes no mention of distribution to, or preference of, the policyholders regarding the disposition of fund assets. Third, neither contingency has occurred, and the section is not applicable. The chapter has not been repealed, nor has the Commissioner of Insurance decided it is necessary to dissolve the fund.

Because we do not interpret the contractual promises inherent in the statutory scheme when the policies in

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the amount thereof in respect to any or all of such employers as circumstances may require and the condition of the respective plants, establishments, or places of work in respect to the safety of their employees may justify. However, premiums or assessments shall be levied on a basis that shall not be excessive, inadequate, or unfairly discriminatory.

[23] Section 751 of the WDCA provides:

If this chapter is repealed, or if in the judgment of the commissioner it becomes necessary to dissolve the accident fund, all moneys which are in the accident fund at such time shall be subject to disposition under the direction of the circuit court for the county of Ingham, with due regard to the obligation incurred and existing to pay compensation under the provisions of this act.

question were purchased, §§ 711a, 712, 746 and 751, to be those urged by plaintiffs, we need not proceed to the second or third prong of the impairment of contract analysis. The policy in effect when premiums were paid by plaintiffs provided that, in return for the premium, the fund promised to pay benefits required by the worker's compensation law. Therefore, policyholders do have a vested contractual right to liability coverage for the period in question for which premiums have been paid. But they have not demonstrated that the contract thus established has, or will be, impaired by operation of § 701a. Plaintiffs' impairment of contract claim must therefore fail.

V

Having found no violation of the Contract Clause, we next address the policyholders' contention that the legislation in question constitutes a taking of private property without compensation in violation of the state and federal constitutions. Relying on the Court of Appeals decision in *Comm'r of Ins, supra,* plaintiffs claim that § 701a is unconstitutional because the policyholders "own" the assets being transferred to Blue Cross and Blue Shield of Michigan. They argue that the assets of the fund are held by the state in trust for the benefit of the policyholders.[24]

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[24] Plaintiffs' property claim is not as clearly differentiated from their impairment of contract claim as this discussion makes it appear. They also argue that their contract rights are property rights. However, as we have concluded above, they have no contract rights beyond the right to insurance.

A

The constitutions of both the United States and the State of Michigan provide that private property shall not be taken without due process or just compensation. US Const, Am V; Const 1963, art 10, § 2, and art 1, § 17.[25]

The United States Supreme Court has often repeated that the purpose of the constitutional prohibition against the government's taking private property without providing just compensation is " 'to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.' " *Dolan* v *City of Tigard*, 512 US ___, ___; 114 S Ct 2309; 129 L Ed 2d 304, 316 (1994), quoting *Armstrong* v *United States*, 364 US 40, 49; 80 S Ct 1563; 4 L Ed 2d 1554 (1960); see also *Hodel* v *Irving*, 481 US 704, 714; 107 S Ct 2076; 95 L Ed 2d 668 (1987); *Kaiser Aetna* v *United States*, 444 US 164, 175; 100 S Ct 383; 62 L Ed 2d 332 (1979); *Penn Central Trans Co* v *New York City*, 438 US 104, 124; 98 S Ct 2646; 57 L Ed 2d 631 (1978).

One who asserts an uncompensated taking claim must first establish that a vested property right is affected. *Minty* v *Bd of State Auditors*, 336 Mich 370, 390; 58 NW2d 106 (1953). To constitute a vested right, the

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[25] U.S. Const, Am V provides in part: "nor shall any person . . . be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation."

The Fifth Amendment of the federal constitution is applicable to the states through the Fourteenth Amendment. *Penn Central Transportation Co* v *New York City*, 438 US 104, 122; 98 S Ct 2646; 57 L Ed 2d 631 (1978).

interest must be " 'something more than such a mere expectation as may be based upon an anticipated continuance of the present general laws; it must have become a title, legal or equitable, to the present or future enjoyment of property. . . . ' " *Id.*, quoting 2 Cooley, Constitutional Limitations (8th ed), p 749. Without a property right, a plaintiff has no basis for challenging a statute on the ground that it constitutes a confiscatory taking without due process of law. *McAvoy* v *H B Sherman Co, supra* at 451.

As policyholders, plaintiffs have not pointed to any language in the insurance policies issued by the fund that expressly confers a right of participation in any surplus that might have accumulated in the fund.[26]

Nor has attention been called to any other provision of the policy that expressly grants or recognizes an ownership interest on the part of policyholders in the assets of the fund. In asserting their claim, plaintiffs rely on the statutory scheme in place when they purchased their insurance and interpretations given to statutory provisions by the courts. However, the only express references in the statute to surplus distribution are found in § 712 (the one-time distribution to 1986-89 policyholders which is not the subject of this appeal),[27] and in § 746,[28] which gives the executive director discretion to pay dividends

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[26] The policy provides: "you will receive any dividends declared on this policy in accordance with the provisions of applicable law." Under the statutory framework, it appears that whether a dividend is declared is a matter left to the discretion of the fund's executive director.

[27] Count II in *Fun 'N Sun* asserts that defendants placed too little money in escrow.

[28] See n 16.

to policyholders. Because § 746 makes no promise that dividends will ever be paid, it does not create a vested right.[29]

B

Against that background, we look at the "trust" language used by the Court of Appeals in *Comm'r of Ins* and consider its significance today. As noted earlier, the Court focused on former § 711 and said: "We interpret *this provision* to mean that just as the state does not subsidize the Accident Fund, neither can it receive any 'profits' from the fund to expend for other purposes."

The Court continued:

> Thus, while the State of Michigan holds the assets of the Accident Fund *in trust* and . . . has control over those funds . . . , it can withdraw no money from the fund to use for any other state expenditures and *those funds may only be expended to further the purpose of the Accident Fund.* [173 Mich App 588 (emphasis added).]

We note that the "trust" language then employed by the Court did not speak in terms of an ownership interest on the part of policyholders. Indeed, the Court did not expressly identify any beneficiary of the "trust" to which it referred.

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[29] Cf. *Methodist Hosp, supra,* 64 NY2d 377, "what has been said so far establishes that State Insurance Fund policyholders have no property interest in the surplus of the Fund, *short of the actual declaration of a dividend* by the Commissioners." (Emphasis supplied.)

We are convinced that the Court of Appeals used the words "in trust" in an informal, descriptive sense, rather than as declaration of a formal trust relationship. The Court did not review any law on the creation of trusts,[30] for instance, on express trusts.[31] The Court did not make

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[30] Section 17 of the Restatement of Trusts, 2d, p 59, states:

A trust may be created by

(a) a declaration by the owner of property that he holds it as trustee for another person; or

(b) a transfer inter vivos by the owner of property to another person as trustee for the transferor or for a third person; or

(c) a transfer by will by the owner of property to another person as trustee for a third person; or

(d) an appointment by one person having a power of appointment to another person as trustee for the donee of the power or for a third person; or

(e) a promise by one person to another person whose rights thereunder are to be held in trust for a third person.

[31] For example, 89 CJS, Trusts, § 42, pp 770-772 states:

A sufficient declaration of trust is essential to the creation of an express or voluntary trust, which- . . . when the statute so requires, must be in writing. Such trusts are generally created by an instrument or instruments pointing out directly and expressly the property, persons, and purpose of the trust, or by an agreement or contract between the parties expressing the intended trust. The declaration must contain sufficient words to create the trust, and it must embody all the essential elements of a trust. It must express the intention to create a trust . . . and state with certainty the terms, subject, persons, and object of the trust; and it has been stated that the trustee must be authorized and directed to perform certain duties and assume certain obligations. A trust is not created

any findings regarding the type of inequitable conduct that would lead to the imposition of a constructive trust.[32] The better inference is that the Court of Appeals used the words "in trust" in the sense that the state's receipt of the policyholders' premiums resulted in an obligation to manage those premiums to assure the intended benefit, insurance coverage.[33]

Plaintiffs argue that the supposed recognition of a trust in *Comm'r of Ins* is supported by similarities between their situation and the members of a mutual insurance company because in both instances the policyholder/member is subject to assessment if premiums are insufficient to pay claims. We disagree. Unlike members of a mutual insurance company, those who purchase insurance from the Accident Fund have no effective voice in the operation or management of the enterprise. Their only role is to participate in the selection of an advisory board, whose authority is limited to providing advice to the commissioner. See § 755. As noted in 6 Couch, Insurance, 2d, § 34:119, p 970: "A policyholders in a mutual life insurance company has a property interest in the surplus

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unless the settlor imposes enforceable duties on the transferee.

See also *Townsend* v *Gordon*, 308 Mich 438; 14 NW2d 57 (1944).

[32] See *Kent* v *Klein*, 352 Mich 652; 91 NW2d 11 (1958), and *Union Guardian Trust Co* v *Emery*, 292 Mich 394; 290 NW 841 (1940).

[33] We also note that the Court of Appeals in *Comm'r of Ins* could only consider the claims raised in that litigation and the then-current statutes. There was no legislative authority for the sale of the Accident Fund at that time, and no claim based on a potential sale.

of the company. . . . In contrast, under a nonparticipating policy the insured is not entitled to any portion on division of surplus by the insurer."[34]

In *Methodist Hosp, supra,* the New York Court of Appeals considered and rejected an argument that the New York State Accident Fund was a mutual fund. Citing 2 Couch, Insurance 2d, § 19.14, p 679 the court responded:

> Nothing in article 6 of the Workers' Compensation Law expressly establishes the SIF [State Insurance Fund] as a mutual insurance organization. A mutual insurance company is organized and operated for the benefit of its policyholders who are by virtue of their policies member of the company . . . with the possible exception of companies whose annual dividends are mandated by statute, the right to receive a dividend when declared creates no trust or

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[34] If the Legislature had seen fit to establish the fund as a mutual insurance company, or course, plaintiffs would be in a better position to assert a property interest in the surplus of the fund:

> The principle which lies at the foundation of mutual insurance and gives it its name is mutuality; in other words, the intervention of each person insured in the management of the affairs of the company and the participation of each member in the profits and losses of the business in proportion to his interest. [*Kamm & Schellinger Brewing Co* v *St Joseph Co Village Fire Ins Co,* 168 Mich 606, 620; 134 NW 999 (1912).]

Because the fund is not a mutual insurance company, see *Comm'r of Ins, supra,* p 580, any claim that would analogize the rights of the policyholders to those of members of a mutual insurance company is inapposite.

> property interest of the policyholder in the surplus. . . . " [64 NY2d 374-375 (citations omitted).]

The "trust" language used by the *Comm'r of Ins* panel did not establish an ownership interest in the policyholders, but recognized only a responsibility on the part of the state to assure that assets of the fund were to be held and expended in accordance with the provisions of existing law. Of course, the principal beneficiaries of the proper exercise of such a responsibility are the employees who may be injured, as well as the employers who are insured. We conclude, however, that recognition of such a relationship conferred no property right or ownership interest in the assets of the fund.

As *McAvoy* instructed, in the absence of a property right, there can be no taking that violates due process. In *McAvoy*, this Court considered a claim of confiscatory taking involving the Second Injury Fund (SIF). Like the Accident Fund, the SIF was created by the legislature as part of the WDCA. It insures "carriers and self-insured employers against certain losses occurring due to worker's compensation claims." *Id.*, p 450. Because carriers are required by law to pay into the SIF, the *McAvoy* plaintiff, a carrier, complained that any reimbursement it received from the fund was "self-reimbursement," which constituted a confiscatory taking. In rejecting this contention, Justice Moody, speaking for the Court, explained:

> The Second Injury Fund does *not* belong to the carriers. No employer or carrier has a direct or vested interest in the fund.

* * *

> Since the Second Injury Fund is a creature of the state, no property right would inure to employers or carriers. Without a corresponding property right, it could not be maintained that the instant reimbursement provision constitutes a confiscatory taking without due process of law. [*Id.*, pp 450-451.]

In its *Fun 'N Sun* opinion, the Court of Claims distinguished *McAvoy* on the ground that SIF insureds "are required by law to pay into the fund," whereas one who becomes an Accident Fund policyholder does so voluntarily.

It is true that employers who purchase insurance from the Accident Fund do so voluntarily. Indeed, they make a decision each year whether to choose the Accident Fund from among more than two hundred carriers offering similar coverage in Michigan. However, the fact that an employer is free to purchase insurance from any of a number of sources does not affect the character of the Accident Fund; it is a state agency. Moreover, the voluntary nature of an employer's decision to purchase insurance from the Accident Fund does not, by itself, establish any property right in the fund.

Cases cited by the Court of Claims in which other state courts had employed similar trust language focused primarily on the protection of insurance funds from appropriations that would undermine protection otherwise provided for injured workers.[35] There is no suggestion here that Michigan

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[35] See *Moran* v *State ex rel Derryberry*, 534 P2d 1282 (Okla, 1975); *Chez* v *Industrial Comm of Utah*, 90 Utah 447; 62 P2d 549 (1936).

workers will have less protection if the proposed sale is consummated. Rather, there is reason to believe that worker protection would be enhanced.[36]

Plaintiffs have not contended that there is any aspect of the proposed sale of the fund pursuant to 1993 PA 198 that is inconsistent with the purposes of the WDCA. Under the authorizing legislation, the assets and liabilities of the fund will transfer to the buyer. The surplus is not being retained by the state. It will remain as surplus under the terms of the sale.

None of the cases cited by plaintiffs as authority for policyholder ownership of fund assets involved the sale of a business with the buyer purchasing all assets and assuming all liabilities.[37]

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[36] Section 700(b) provides that any purchaser of the Accident Fund must be an insurer organized pursuant to chapter 51 of the Insurance Code. MCL 500.5100 *et seq.*; MSA 24.15100 *et seq.* Such a purchaser is required to be a member of the Property and Casualty Guaranty Association (PCGA), which is organized pursuant to MCL 500.7901 *et seq.*; MSA 24.17901 *et seq.* to cover claims against an insolvent member.

The Accident Fund, on the other hand, is not a member of the PCGA, and the state is not "liable or responsible for the payment of claims for compensation . . . beyond the extent of the sums so collected and received." § 701(1).

[37] *McArthur* v *Smallwood*, 225 Ark 328, 333-334; 281 SW2d 428 (1955), the Legislature's clear designation of the workmen's compensation commission fund as "cash funds" meant that it irrevocably pledged that fees paid by worker's disability compensation insurance carriers and self-insurers would not be available for general purposes); *State ex rel Williams* v *Musgrave*, 84 Idaho 77, 84-85; 370 P2d 778 (1962) (where the statute provides that the state treasurer is the custodian of the workmen's compensation fund, the state insurance manager may authorize

We find nothing, explicit or implicit, in the policy contract or the governing statutes that gives rise to the vested property interest asserted by plaintiffs. In the absence of such a vested property interest, their claim of confiscatory taking must fail.

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expenditures in furtherance of the fund's purposes without an appropriation by the legislature); *Senske* v *Fairmont & Waseca Canning Co*, 232 Minn 350, 355; 45 NW2d 640 (1951) (where the statute provided that the state treasurer was the custodian of the compensation fund and that the industrial commission would direct disbursements, the state treasurer is vested only with ministerial duties); *State ex rel Beebe* v *McMillan*, 36 Nev 383, 388-389; 136 P 108 (1913) (by statute, the state insurance fund is a special fund and regarding disbursements, not subject to the requirements of approval by the Board of Examiners claims made against the state treasury are subject to); *State ex rel Stearns* v *Olson*, 43 ND 619, 625-626; 175 NW 714 (1919) (because the state treasurer has been designated custodian of the fund, the method for disbursing funds from the Workmen's Compensation Fund provided for by the Legislature, is for the Workmen's Compensation Bureau to direct the state treasurer to pay the claim and not the manner required for disbursement of state funds, i.e., a request to the state auditor); *Moran* v *State ex rel Derryberry*, n 35 *supra*, p 1286 (assets of the State Insurance Fund may not be appropriated for general purposes where the State Insurance Fund Act states explicitly that the fund will "operate and maintain in the same manner as privately owned insurance company" and "become neither more nor less than self-supporting"); *Chez* v *Industrial Comm of Utah*, n 35 *supra*, pp 452-453 (under a statute that includes language specifying that unneeded reserves will be returned to contributing employers, the State Insurance Fund is not public money).

VI

Accordingly, our answer to the certified question is that the portion of § 701a that declares the consideration for the sale of the Accident Fund to be the property of the State of Michigan does not violate either the state or the federal constitution.

/s/ Robert P. Griffin

/s/ Conrad L. Mallett, Jr.

/s/ James H. Brickley

/s/ Patricia J. Boyle

STATE OF MICHIGAN

SUPREME COURT

IN THE MATTER OF THE EXECUTIVE MESSAGE OF THE GOVERNOR

FUN 'N SUN R.V., INC, et al,

Plaintiffs,

v

No. 99562

STATE OF MICHIGAN, et al,

Defendants.

BEFORE THE ENTIRE BENCH

CAVANAGH, C.J. (dissenting).

Michigan's State Accident Fund appears to be similar to funds throughout the nation. The status of all these funds are determined by the statutes that create them. Several common principles seem to govern the analysis: (1) whether the state has any liability beyond the assets of the fund;[1] (2) whether the assets of the fund are exclusively generated by premiums;[2] (3) whether the fund was intended to be run as a for-profit business;[3] and (4) a

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[1] *Moran* v *State ex rel Derryberry*, 534 P2d 1282, 1286 (Okla, 1975).

[2] *Chez* v *Utah Industrial Comm*, 90 Utah 447, 449-451; 62 P2d 549 (1936).

[3] *Moran*, n 1 *supra* at 1286.

consideration of for what purposes the funds may be used.[4]

Applying these principles to Michigan's act, it is clear that: (1) the state has no liability beyond the assets of the fund;[5] (2) the assets of the fund are generated exclusively through premiums and the investment thereof;[6] (3) the fund was not originally intended to be run as a for-profit business; and (4) the assets of the fund are to be used exclusively to implement the policies underlying the worker's compensation act.

On review of decisions from our sister states, we conclude that the repeal by 1990 PA 157 of MCL 418.711; MSA 17.237 (711), which provided that the fund shall be neither more nor less than self-sufficient, should not change the interest of the insured employers.

The fund was not intended by the Legislature of 1912 to be a for-profit business. It was intended to implement the worker's compensation act. The Legislature did not intend for the state to obtain a profit from operation of the fund, or gain by reason of an unexpected windfall, at the expense of the premium-paying employers in a declared nonprofit business. It is also significant that the

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[4] *Chez*, n 2 *supra* at 550.

[5] See MCL 418.701(1); MSA 17.237(701)(1) ("The state shall not be liable or responsible for the payment of claims for compensation"), and MCL 418.725; MSA 17.237(725) ("neither the state nor the association is liable if the accident fund is declared insolvent").

[6] See MCL 418.705; MSA 17.237(705), and MCL 418.746(1); MSA 17.237(746)(1).

premiums collected by the fund are to be used exclusively for the purposes stated in MCL 418.746; MSA 17.237(746). Those named purposes include, among others, "[d]ividends and similar payments to policyholders."[7]

The assets of the State Accident Fund are held in trust for the insured employers.[8] They have a vested interest in the funds held in trust for their benefit. The insured employers were always, at least theoretically, "on the risk," while the state never had any risk. If those funds were squandered, they still must provide benefits to any employee who suffers a compensable injury. These vested rights may not be deprived without just compensation.

We conclude that 1993 PA 198, amending the worker's compensation act by adding MCL 417.701a;

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[7] 1993 PA 198, amending the Worker's Compensation Act by adding § 701a, MCL 418.701a; MSA 17.237(701a), which provides that the consideration for the transfer of the assets of the State Accident Fund to a permitted transferee "shall be the property of the state of Michigan," is tie-barred to the repeal of § 746, MCL 418.746; MSA 17.237(746), and of other sections of the Worker's Compensation Act. Section 746 provides that the executive director of the state accident fund shall maintain a revolving fund derived from premiums collected from members of the fund, and that the revolving fund shall be used exclusively for among other purposes "[d]ividends and similar payments to policyholders."

[8] A vested right has been defined by this Court as "implying a vested interest which it is right and equitable that the government should recognize and protect, and of which the individual could not be deprived without injustice." *Wylie* v *City Comm*, 293 Mich 571, 587; 292 NW 668 (1940).

MSA 17.237(701a), providing that the consideration for the sale of the fund is the property of the State of Michigan, is unconstitutional because it violates US Const, Am V; Const 1963, art 10, § 2, and art 1, § 17.

/s/ Michael F. Cavanagh

/s/ Charles L. Levin

(logo)

WC 99 00 00

Accident Fund of Michigan
232 S. Capitol Ave.
P.O. Box 40790
Lansing, MI 48901-7990
Telephone (517) 342-4200

WORKERS COMPENSATION AND EMPLOYERS LIABILITY INSURANCE POLICY

The Accident Fund is an agency of state government and is not a member of the property and casualty guaranty association, and neither the state nor the association is liable if the Accident Fund is declared insolvent during the effective period of the policy.

In return for the payment of the premium and subject to all terms of this policy, we agree with you as follows:

GENERAL SECTION

A. The Policy

This policy includes at its effective date the Information Page and all endorsements and schedules listed there. It is a contract of insurance between you (the employer named in item 1 of the Information Page) and us (the insurer named on the Information Page). The only agreements relating to this insurance are stated in this policy. The terms of this policy may not be changed or waived except by endorsement issued by us to be part of this policy.

B. Who is Insured

You are insured if you are an employer named in item 1 of the Information Page. If that

employer is a partnership, and if you are one of its partners, you are insured, but only in your capacity as an employer of the partnership's employees.

C. Workers Compensation Law

Workers Compensation Law means the workers or workmen's compensation law and occupational disease law of each state or territory named in item 3.A. of the Information Page. It includes any amendments to that law which are in effect during the policy period. It does not include the provisions of any law that provide nonoccupational disability benefits.

D. State

State means any state of the United States of America, and the District of Columbia.

E. Locations

This policy covers all of your workplaces listed in items 1 or 4 of the Information Page; and it covers all other workplaces in item 3.A. states unless you have other insurance or are self-insured for such workplaces.

PART ONE – WORKERS COMPENSATION INSURANCE

A. How This Insurance Applies

This workers compensation insurance applies to bodily injury by accident or bodily injury by disease. Bodily injury includes resulting death.

1. Bodily injury by accident must occur during the policy period.

2. Bodily injury by disease must be caused or aggravated by the conditions of your employment. The employee's last day of last exposure to the conditions causing or aggravating such bodily injury by disease must occur during the policy period.

B. We Will Pay

We will pay promptly when due the benefits required of you by the workers compensation law.

C. We Will Defend

We have the right and duty to defend at our expense any claim, proceeding or suit against you for benefits payable by this insurance. We have the right to investigate and settle these claims, proceedings or suits.

We have no duty to defend a claim, proceeding or suit that is not covered by this insurance.

D. We Will Also Pay

We will also pay these costs, in addition to other amounts payable under this insurance, as part of any claim, proceeding or suit we defend:

1. reasonable expenses incurred at our request, but not loss of earnings;

2. premiums for bonds to release attachments and for appeal bonds in bond amounts up to the amount payable under this insurance;

3. litigation costs taxed against you;

4. interest on a judgment as required by law until we offer the amount due under this insurance; and

5. expenses we incur.

E. Other Insurance

We will not pay more than our share of benefits and costs covered by this insurance and other insurance or self-insurance. Subject to any limits of liability that may apply, all shares will be equal until the loss is paid. If any insurance or self-insurance is exhausted, the shares of all remaining insurance will be equal until the loss is paid.

F. Payments You Must Make

You are responsible for any payments in excess of the benefits regularly provided by the workers compensation law including those required because:

1. of your serious and willful misconduct;

2. you knowingly employ an employee in violation of law;

3. you fail to comply with a health or safety law or regulation; or

4. you discharge, coerce or otherwise discriminate against any employee in violation of the workers compensation law.

If we make any payments in excess of the benefits regularly provided by the workers compensation law on your behalf, you will reimburse us promptly.

G. Recovery From Others

We have your rights, and the rights of persons entitled to the benefits of this insurance, to recover our payments from anyone liable for the injury. You will do everything necessary to protect those rights for us and to help us enforce them.

H. Statutory Provisions

These statements apply where they are required by law.

1. As between an injured worker and us, we have notice of the injury when you have notice.

2. Your default or the bankruptcy or insolvency of you or your estate will not relieve us of our duties under this insurance after an injury occurs.

3. We are directly and primarily liable to any person entitled to the benefits payable by this insurance. Those persons may enforce our duties; so may an agency authorized by law. Enforcement may be against us or against you and us.

4. Jurisdiction over you is jurisdiction over us for purposes of the workers compensation law. We are bound by decisions against you under that law, subject to the provisions of

this policy that are not in conflict with that law.

5. This insurance conforms to the parts of the workers compensation law that apply to:

   a. benefits payable by this insurance;

   b. special taxes, payments into security or other special funds, and assessments payable by us under that law.

6. Terms of this insurance that conflict with the workers compensation law are changed by this statement to conform to that law.

Nothing in these paragraphs relieves you of your duties under this policy.

PART TWO – EMPLOYERS LIABILITY INSURANCE

A. How This Insurance Applies

This employers liability insurance applies to bodily injury by accident or bodily injury by disease. Bodily injury includes resulting death.

1. The bodily injury must arise out of and in the course of the injured employee's employment by you.

2. The employment must be necessary or incidental to your work in a state or territory listed in item 3.A. of the Information Page.

3. Bodily injury by accident must occur during the policy period.

4. Bodily injury by disease must be caused or aggravated by the conditions of your employment. The employee's last day of last

exposure to the conditions causing or aggravating such bodily injury by disease must occur during the policy period.

5. If you are sued, the original suit and any related legal actions for damages for bodily injury by accident or by disease must be brought in the United States of America, its territories or possessions, or Canada.

B. We Will Pay

We will pay all sums you legally must pay as damages because of bodily injury to your employees, provided the bodily injury is covered by this Employers Liability insurance.

The damages we will pay, where recovery is permitted by law, include damages:

1. for which you are liable to a third party by reason of a claim or suit against you by that third party to recover the damages claimed against such third party as a result of injury to your employee;

2. for care and loss of services; and

3. for consequential bodily injury to a spouse, child, parent, brother or sister of the injured employee;

provided that these damages are the direct consequence of bodily injury that arises out of and in the course of the injured employee's employment by you; and

4. because of bodily injury to your employee that arises out of and in the course of employment, claimed against you in a capacity other than as employer.

C. Exclusions

This insurance does not cover:

1. liability assumed under a contract. This exclusion does not apply to a warranty that your work will be done in a workmanlike manner;

2. punitive or exemplary damages because of bodily injury to an employee employed in violation of law;

3. bodily injury to an employee while employed in violation of law with your actual knowledge or the actual knowledge of any of your executive officers;

4. any obligation imposed by a workers compensation, occupational disease, unemployment compensation, or disability benefits law, or any similar law;

5. bodily injury intentionally caused or aggravated by you;

6. bodily injury occurring outside the United States of America, its territories or possessions, and Canada. This exclusion does not apply to bodily injury to a citizen or resident of the United States of America or Canada who is temporarily outside these countries;

7. damages arising out of the discharge of, coercion of, or discrimination against any employee in violation of law.

D. We Will Defend

We have the right and duty to defend, at our expense, any claim, proceeding or suit against

you for damages payable by this insurance. We have the right to investigate and settle these claims, proceedings and suits.

We have no duty to defend a claim, proceeding or suit that is not covered by this insurance. We have no duty to defend or continue defending after we have paid our applicable limit of liability under this insurance.

E. We Will Also Pay

We will also pay these costs, in addition to other amounts payable under this insurance, as part of any claim, proceeding, or suit we defend:

1. reasonable expenses incurred at our request; but not loss of earnings;
2. premiums for bonds to release attachments and for appeal bonds in bond amounts up to the limit of our liability under this insurance;
3. litigation costs taxed against you;
4. interest on a judgment as required by law until we offer the amount due under this insurance; and
5. expenses we incur.

F. Other Insurance

We will not pay more than our share of damages and costs covered by this insurance and other insurance or self-insurance. Subject to any limits of liability that apply, all shares will be equal until the loss is paid. If any insurance or self-

insurance is exhausted, the shares of all remaining insurance and self-insurance will be equal until the loss is paid.

G. Limits of Liability

Our liability to pay for damages is limited. Our limits of liability are shown in item 3.B. of the Information Page. They apply as explained below.

1. Bodily Injury by Accident. The limit shown for "bodily injury by accident – each accident" is the most we will pay for all damages covered by this insurance because of bodily injury to one or more employees in any one accident.

   A disease is not bodily injury by accident unless it results directly from bodily injury by accident.

2. Bodily Injury by Disease. The limit shown for "bodily injury by disease – policy limit" is the most we will pay for all damages covered by this insurance and arising out of bodily injury by disease, regardless of the number of employees who sustain bodily injury by disease. The limit shown for "bodily injury by disease-each employee" is the most we will pay for all damages because of bodily injury by disease to any one employee.

   Bodily injury by disease does not include disease that results directly from a bodily injury by accident.

3. We will not pay any claims for damages after we have paid the applicable limit of our liability under this insurance.

H. Recovery From Others

We have your rights to recover our payment from anyone liable for an injury covered by this insurance. You will do everything necessary to protect those rights for us and to help us enforce them.

I. Actions Against Us

There will be no right of action against us under this insurance unless:

1. you have complied with all the terms of this policy; and
2. the amount you owe has been determined with our consent or by actual trial and final judgment.

This insurance does not give anyone the right to add us as a defendant in an action against you to determine your liability.

PART THREE – OTHER STATES INSURANCE

A. How This Insurance Applies

1. This other states insurance applies only if one or more states are shown in item 3.C. of the Information Page.
2. If you begin work in any one of those states and are not insured or are not self-insured for such work, the policy will apply as

though that state were listed in item 3.A. of the Information Page.

3. We will reimburse you for the benefits required by the workers compensation law of that state if we are not permitted to pay the benefits directly to persons entitled to them.

B. Notice

Tell us at once if you begin work in any state listed in item 3.C. of the Information Page.

PART FOUR – YOUR DUTIES IF INJURY OCCURS

Tell us at once if injury occurs that may be covered by this policy. Your other duties are listed here.

1. Provide for immediate medical and other services required by the workers compensation law.

2. Give us or our agent the names and addresses of the injured persons and of witnesses, and other information we may need.

3. Promptly give us all notices, demands, and legal papers related to the injury, claim, proceeding or suit.

4. Cooperate with us and assist us, as we may request, in the investigation, settlement or defense of any claim, proceeding or suit.

5. Do nothing after an injury occurs that would interfere with our right to recover from others.

6. Do not voluntarily make payments, assume obligations or incur expenses, except at your own cost.

PART FIVE – PREMIUM

A. Our Manuals

All premiums for this policy will be determined by our manuals of rules, rates, rating plans and classifications. We may change our manuals and apply the changes to this policy if authorized by law or a governmental agency regulating this insurance.

B. Classifications

Item 4 of the Information Page shows the rate and premium basis for certain business or work classifications. These classifications were assigned based on an estimate of the exposures you would have during the policy period. If your actual exposures are not properly described by those classifications, we will assign proper classifications, rates and premium basis by endorsement to this policy.

C. Remuneration

Premium for each work classification is determined by multiplying a rate times a premium basis. Remuneration is the most common premium basis. This premium basis includes payroll and all other remuneration paid or payable during the policy period for the services of:

1. all your officers and employees engaged in work covered by this policy; and

2. all other persons engaged in work that could make us liable under Part One (Workers Compensation Insurance) of this policy. If you do not have payroll records for these persons, the contract price for their services and materials may be used as the premium basis. This paragraph 2 will not apply if you give us proof that the employers of these persons lawfully secured their workers compensation obligations.

D. Premium Payments

You will pay all premiums when due. You will pay the premium even if part or all of a workers compensation law is not valid.

E. Final Premium

The premium shown on the Information Page, schedules, and endorsements is an estimate. The final premium will be determined after this policy ends by using the actual, not the estimated, premium basis and the proper classifications and rates that lawfully apply to the business and work covered by this policy. If the final premium is more than the premium you paid to us, you must pay us the balance. If it is less, we will refund the balance to you. The final premium will not be less than the highest minimum premium for the classifications covered by this policy.

If this policy is canceled, final premium will be determined in the following way unless our manuals provide otherwise.

1. If we cancel, final premium will be calculated pro rata based on the time this policy

was in force. Final premium will not be less than the pro rata share of the minimum premium.

2. If you cancel, final premium will be more than pro rata; it will be based on the time this policy was in force, and increased by our short rate cancelation [sic] table and procedure. Final premium will not be less than the minimum premium.

F. Records

You will keep records of information needed to compute premium. You will provide us with copies of those records when we ask for them.

G. Audit

You will let us examine and audit all your records that relate to this policy. These records include ledgers, journals, registers, vouchers, contracts, tax reports, payroll and disbursement records, and programs for storing and retrieving data. We may conduct the audits during regular business hours during the policy period and within three years after the policy period ends. Information developed by audit will be used to determine final premium. Insurance rate service organizations have the same rights we have under this provision.

PART SIX – CONDITIONS

A. Inspection

We have the right, but are not obliged to inspect your workplaces at any time. Our inspections

are not safety inspections. They relate only to the insurability of the workplaces and the premiums to be charged. We may give you reports on the conditions we find. We may also recommend changes. While they may help reduce losses, we do not undertake to perform the duty of any person to provide for the health or safety of your employees or the public. We do not warrant that your workplaces are safe or healthful or that they comply with laws, regulations, codes or standards. Insurance rate service organizations have the same rights we have under this provisions.

B. Long Term Policy

If the policy period is longer than one year and sixteen days, all provisions of this policy will apply as though a new policy were issued on each annual anniversary that this policy is in force.

C. Transfer of Your Rights and Duties

Your rights or duties under this policy may not be transferred without our written consent.

If you die and we receive notice within thirty days after your death, we will cover your legal representative as insured.

D. Cancelation [sic]

1. You may cancel this policy. You must mail or deliver advance written notice to us stating when the cancelation [sic] is to take effect.

2. We may cancel this policy. We must mail or deliver to you not less than ten days

advance written notice stating when the cancelation [sic] is to take effect. Mailing that notice to you at your mailing address shown in item 1 of the Information Page will be sufficient to prove notice.

3. The policy period will end on the day and hour stated in the cancelation [sic] notice.

4. Any of these provisions that conflicts with a law that controls the cancelation [sic] of the insurance in this policy is changed by this statement to comply with that law.

E. Sole Representative

The insured first named in item 1 of the Information Page will act on behalf of all insureds to change this policy, receive return premium, and give or receive notice of cancelation [sic].

F. Membership and Voting Notice

This policy is non-assessable. Upon issuance of this policy, as a result of you having requested membership and coverage in writing, you are a member of the Accident Fund of Michigan, while this policy is in force. As a member you will receive any dividends declared on this policy in accordance with the provisions of applicable law. As a member you are also entitled to vote either in person, or by proxy, at the annual meeting and any special meeting of the membership. The annual meeting of the membership is held in Lansing, Michigan on the last Tuesday of October of each year at 10:00 a.m., or in October of each year on the day and at the time specifically designated by the Commissioner of Insurance of the State of Michigan. Notice of the

time and place of the annual meeting, or any special meeting, will be made by mail at least ten (10) days prior to the date of the meeting.

WC 21 03 04

MICHIGAN LAW PROVISIONS

Michigan law requires this paragraph in the language specified by the statute. To help you understand the paragraph, the following definitions are added.

(1) We are "the accident fund"

(2) You are "the insured employer"

(3) "Michigan workmen's compensation act" means the Workers' Disability Compensation Act of 1969

(4) "Workmen's compensation" means workers' compensation

(5) "The bureau of workmen's compensation" means the Bureau of Workers' Disability Compensation

"Notwithstanding any language elsewhere contained in this contract or policy of insurance, the accident fund or the insurer issuing this policy hereby contracts and agrees with the insured employer.

Compensation:

(a) That it will pay to the persons that may become entitled thereto all workmen's compensation for which the insured employer may become liable under the provisions of

the Michigan workmen's compensation act for all compensable injuries or compensable occupational diseases happening to his employees during the life of this contract or policy;

Medical services:

(b) That it will furnish or cause to be furnished to all employees of the employer all reasonable medical, surgical, and hospital services and medicines when they are needed which the employer may be obligated to furnish or cause to be furnished to his employees under the provisions of the Michigan workmen's compensation act and that it will pay to the persons entitled thereto for all such services and medicines when they are needed for all compensable injuries or compensable occupational disease happening to his employees during the life of this contract or policy;

Rehabilitation services:

(c) That it will furnish or cause to be furnished such rehabilitation services for which the insured employer may become liable to furnish or cause to be furnished under the provisions of the Michigan workmen's compensation act for all compensable injuries or compensable occupational disease happening to his employees during the life of this contract or policy;

Funeral expenses:

(d) That it will pay or cause to be paid the reasonable expense of the last sickness and burial of all employees whose deaths are caused by compensable injuries or compensable occupational diseases happening during the life of this contract or policy and arising out of and in the course of their employment with the employer, which the employer may be obligated to pay under the provisions of the Michigan workmen's compensation act;

Scope of contract:

(e) That this insurance contract or policy shall for all purposes be held and deemed to cover all the businesses the said employer is engaged in at the time of the issuance of this contract or policy and all other businesses, if any, the employer may engage in during the life thereof, and all employees the employer may employ in any of his businesses during the period covered by this policy;

Obligations assumed:

(f) That it hereby assumes all obligations imposed upon the employer by his acceptance of the Michigan workmen's compensation act, as far as the payment of compensation, death benefits, medical, surgical, hospital care or medicine and rehabilitation services is concerned;

Termination notice:

(g) That it will file with the bureau of workmen's compensation at Lansing, Michigan, at least 20 days before the taking effect of any termination or cancelation [sic] of this contract or policy, a notice giving the date at which it is proposed to terminate or cancel this contract or policy; and that any termination of this policy shall not be effective as far as the employees of the insured employer are concerned until 20 days after notice of proposed termination or cancelation [sic] is received by the bureau of workmen's compensation;

Conflicting provisions:

(h) That all the provisions of this contract, if any, which are not in harmony with this paragraph are to be construed as modified hereby, and all conditions and limitations in the policy, if any, conflicting herewith are hereby made null and void."

This policy is signed at Lansing, Michigan on behalf of the Accident Fund of Michigan by our Executive Director or Designee.

/s/ Roger J. Pries

WC 21 03 03

MICHIGAN NOTICE TO POLICY HOLDERS

This notice is required by Michigan law.

1. **Rates and Premium**

The policy contains rates and classifications that apply to your type of business. If you have any questions regarding the rates or classification, please contact us or your agent.

You may obtain pertinent rating information by submitting a written request to us at our address shown on this notice. We may require you to pay a reasonable charge for furnishing the information.

You may also submit a written request for a review of the method by which your rates and premiums were determined. If you are not satisfied with the results of the review, you may appeal to the Commission of Insurance at the address shown in this notice.

2. **Payroll Audits**

You may request a payroll audit once each calendar year. Your request must be in writing sent to our address shown in this notice. You must state that you believe your payroll expenditures have changed by 20% or more, and you must state the reasons for that belief. We will complete the audit within 120 days of receipt of your request if you provide us with all information we need to perform the audit.

3. **Reserves or Redemption**

You may request reserve and redemption information that relates to the premium for this policy. Your request must be in writing sent to our address shown in this notice. We will provide you with that information within thirty (30) days of receipt of your request.

If you believe the policy premiums are excessive because we set unreasonable reserves or because of the unreasonable redemption of a claim, you may request a meeting with our management representative. Your request must be in writing sent to our address shown in this notice. If you are not satisfied with the results of the meeting, you may appeal to the Insurance Commissioner at the address shown in this notice.

Addresses

Underwriting Manager
Accident Fund of Michigan
232 S. Capitol Avenue
P.O. Box 40790
Lansing, Michigan 48901-7990

Commissioner of Insurance
Michigan Insurance Bureau
Department of Licensing & Regulation
P.O. Box 30220
Lansing, Michigan 48909

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

ACCIDENT FUND, legal entity authorized by the Michigan Legislature pursuant to 1912 PA 10 (First Extra Session) Part V, §1; 1915 CL 5477, ET AL,

Plaintiffs,

vs.

NANCY A. BAERWALDT, Commissioner of Insurance of the State of Michigan, ET AL,

Defendants.

Case No. G81-224

HON. RICHARD A. ENSLEN

Theodore W. Swift (P 21213)
David Vanderhaagen (P 23169)
Frank J. Nerat, Jr. (P 29140)
Attorneys for Plaintiff

Harry G. Iwasko, Jr. (P 15364)
Robert Ianni (P 24084)
Philip J. Smith (P 20699)
Attorneys for Defendants

CONSENT JUDGMENT

(Filed Jan. 9, 1984)

At a session of said court held in the Federal Courthouse, 410 West Michigan, Kalamazoo, Michigan, on this 9th day of January, 1984.

HONORABLE RICHARD A. ENSLEN

Upon reading and filing the stipulation of the parties hereto agreeing that a consent judgment shall enter resolving the deprivation of property without due process and confiscation of property without just compensation claims of Plaintiffs Accident Fund, Elston-Richards Storage Company and Russell Jameson, and in consideration of the premises, NOW THEREFORE, IT IS HEREBY,

ORDERED, ADJUDGED AND DECREED, upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment, that final judgment, in favor of the Plaintiffs Accident Fund, Elston-Richards Storage Company and Russell Jameson and against the Defendants Nancy A. Baerwaldt, Commissioner of Insurance of the State of Michigan, John F. Hueni, Jr., Personnel Director of the State of Michigan, Elizabeth P. Howe, Director of the Department of Licensing and Regulation of the State of Michigan, Robert A. Bowman, Treasurer of the State of Michigan, Robert H. Naftaly, Director of the Department of Management and Budget of the State of Michigan, and the Michigan Civil Service Commission, is hereby granted and ordered entered as partial judgment in this action as follows:

1. This Court has jurisdiction over the above matter pursuant to federal question jurisdiction, 28 USC §1331(a), and civil rights jurisdiction, 28 USC §1343. This action arises under 42 USC §1983. The manner in controversy exceeds the amount of $10,000.00 exclusive of interest and costs.

2. This Court finds and declares that the assets, monies and funds held for or by the Michigan State Accident Fund (which Defendants claim are public funds and Plaintiffs claim are private funds) are trust funds, subject to special purposes as set forth in the Worker's Disability Compensation Act of 1969 and its amendments and the Insurance Code of 1956 and its amendments.

3. This Court finds and declares that the assets, monies and funds held for or by the Michigan State Accident Fund, wherever located and however held, include, but are not necessarily limited to, United States Treasury Securities, Real Estate (including the Home Office Building, Hilding Office Building and other Land & Land Improvement) Cash and Bank Accounts, Short Term Investments, monies and securities held in the State Treasury, Agent Balances and Uncollectible Premiums, Reinsurance Recoverable on Loss Payments, Compensation Supplement Recoverable, Accrued Interest – United States Treasury Securities, Data Processing Equipment, and Furniture and Fixtures.

4. This Court finds and declares that the State of Michigan may not borrow or take the assets, monies and funds held for or by the Michigan State Accident Fund, nor may any of those assets, monies and funds be placed into the State of Michigan general fund, or be used for purposes inconsistent with the Worker's Disability Compensation Act of 1969 and its amendments and the Insurance Code of 1956 and its amendments. By stipulation of the parties, upon the dissolution of the Michigan State Accident Fund, the assets, monies and funds held for or by the Michigan State Accident Fund shall be subject to disposition under the direction of the Ingham County

Circuit Court, as provided by law. This consent judgment shall not be construed to, in any way, limit the investment authority of the Commissioner of Insurance and the State Treasurer, as provided by statute, except that this Court finds and declares that such investment authority must be prudently exercised, nor shall this consent judgment be construed to diminish the rate setting authority of the Commissioner of Insurance, as provided by law.

5. This Court finds and declares that the State of Michigan has no known, ripe or outstanding claims to or equity interest, or any interest other than as trustee, in the assets, monies and funds held for or by the Michigan State Accident Fund. This consent judgment shall not be construed, however, to preclude the State of Michigan from pursuing in the future those presently unknown claims when they may become known or ripe or to affect any claims or interest the State of Michigan has with respect to certain reinsurance obtained by the Accident Fund from Continental Insurance Company, nor to affect claims by State of Michigan employees for worker's compensation benefits.

/s/ Richard A. Enslen
HONORABLE RICHARD A. ENSLEN,
United States District Judge

DRAFTED BY:

Frank J. Nerat, Jr. (P 29140)
FOSTER, SWIFT, COLLINS & COEY, P.C.
313 South Washington Square
Lansing, Michigan 48933
(517) 372-8050

PLAINTIFFS

ACCIDENT FUND, a Legal Entity Authorized by the Michigan Legislature Pursuant to 1912 PA 10 (First Extra Session) Part V, Sec. 1; 1915 CL 5477, WARD ELLISON and MAX GROST, Individually, ELSTON-RICHARDS STORAGE COMPANY and RUSSELL JAMESON, Individually

DEFENDANTS

NANCY A. BAERWALDT, Commissioner
#31 of Insurance of the State of
Sub:Michigan, ~~RICHARD A. ROSS~~, Personnel Director of the State of Michigan, and ~~WILLIAM S. BALLENGER~~, Director of the Department of Licensing and Regulation of the State of Michigan
#31 Substitution: SILVFRIA O. KANOYTON and JOHN HEUENI
#31 Added as defts: LOREN MONROE, Treasur of the State of Michigan, GERALD MILLER, Director of Management and Budget of the State of Michigan, & MI CIVIL SERVICE COMMISSION
(Ingham County) sm

Pretrial 11-21-83

CAUSE

42:USC:1983 & 1988; (CITE THE U.S. CIVIL STATUTE UNDER WHICH THE CASE

28:USC:1331(a) & 1343; IS FILED AND WRITE A BRIEF STATEMENT OF CAUSE)

28:USC:2201 & 29:USC:1132 – Deprivation of Federal rights, impairment of contract violation of Equal Protection. Pltfs allege defts are attempting to force pltf Accident Fund to comply with Attorney General Opinion 5147 which pltfs feel will constitute unlawful confiscation of assets and monies held in trust.

ATTORNEYS

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525 W. Ottawa Street
Lansing, MI 48913
517-373-1160
#58: By: Philip J. Smith
Assistant Atty General
#88: By: Robert Ianni
Assistant Atty General

Jan 9 132) Filed pltfs' Memorandum of Law in Support of Jurisdiction of the Court

" Bench Trial commenced (1); Court signed Consent Judgment resolving deprivation of property without due process and confiscation of property without just compensation claims of pltfs Accident Fund, Elston-Richards Storage Co. and Russell Jameson; Court rules that remainder of case dismissed on grounds of abstention; Court will enter Judgment Order

" 133) Filed CONSENT JUDGMENT – copies mailed to attys Swift & Iwasko

Jan 10 134) Filed Stipulation of Third Set of Uncontested Material Facts w/attached exhibits A thru K

Jan 17 135) Filed defts' Brief in Opposition to pltfs' Motion for Preliminary Injunction

" 136) Filed pltf's Brief in Support of Injunction Pending Appeal w/notice of hearing and proof of service

Jan 20 137) Filed Transcript of Ruling of the Court held 1-9-84 in Kalamazoo, M. Jarratt W. Martin, RPR-CM

Jan 24 138) Filed proof of service for pldg #1135

" 139) Filed letter from atty Smith enclosing copy of opinion in *Citizens Insurance Company of America, et al* v *Nancy A. Baerwaldt, Commissioner of Insurance* (Judge Latreille, Livingston Circuit No. 83-7049-CZ)

" 140) Filed JUDGMENT ORDER that Court in the exercise of is discretion under the doctrine of *Railroad Commission* v *Pullman*

		Company, 312 USC 496 (1941), ABSTAINS from consideration of this action; that Court in the exercise of its discretion under the doctrine of *Burford* v *Sun Oil Company,* 319 USC 315 (1943), ABSTAINS from consideration of this action; and that because the Court abstains under Pullman and Burford doctrines this case is DISMISSED – copies mailed to attys Swift/Nerat & Iwasko
"	141)	Filed OPINION on pltfs' Motion for Injunction Pending Appeal
"	142)	Filed ORDER in accordance w/opinion that pltfs' Motion for Injunction Pending Appeal is denied – copies mailed to attys Swift/Nerat & Iwasko (distribution copies made)
Jan 26	143)	Filed letter from atty Nerat requesting that opinion attached to letter from atty Smith be stricken from the record of this cause (see #139)
Feb 2	144)	Filed OPINION on Abstention – copies mailed to attys Swift & Iwasko
Feb 22	145)	Filed deposition of Ralph Joseph Gerson taken 11-23-83 in Lansing, MI
Feb 22	146)	Filed Pltfs' NOTICE OF APPEAL from judgment entered 1-24-84
Feb 27		Copy of notice of appeal mailed to atty Ianni; copy given to judge and court reporter
"		All information mailed to CCA
Mar 29	147)	Filed Pltf's MOTION for Attorney Fees Pursuant to 42:1988 with attachments

"	148)	Filed Pltf's Memorandum Brief in Support of Motion for Attorney's Fees
"	149)	Filed Pltf's Notice of Hearing motion for attorney fees at a time and date to be set by the court
"	150)	Filed Proof of service for pldgs #147 thru 149
Mar 30	151)	Filed transmission form showing notice of appeal filed 3-1-84 and assigned CCA no. 84-1130

Proceedings include all events. TERMED
1:81CV224 Accident Fund, et al v Baerwaldt, et al

TERMED

U.S. District Court
USDC for the Western District of
Michigan (Grand Rapids)

CIVIL DOCKET FOR CASE #: 81-CV-224

Filed: 05/01/81

Accident Fund, et al v Baerwaldt, et al
Assigned to: Judge Richard A. Enslen
Demand: $0,000
Lead Docket: None
Dkt# in other court: None
Nature of Suit: 440
Jurisdiction: Federal Question

Cause: 42:1983 Civil Rights Act

5/1/81	1	COMPLAINT (SUMMONS issued and returned to pltf's rep) (rla) [Entry date 10/29/90]
3/26/87	175	ORDER (1 pages) by Judge Richard A. Enslen in accordance w/Opinion (2) [174] continuing the stay entered 10/2/85 Case

stayed pending decision by Judge Stell (cc: all counsel) (rla) [Entry date 10/29/90]

10/29/90 176 ORDER (1 pages) by Judge Richard A. Enslen directing pltf to file a Stay Report w/in 10 days of date of this Order; if no report is received the file will be reactivated; pltf directed to file a Stay Report every six months until the matter no longer requires the stay or is settled (cc: all counsel) (rla)

11/9/90 177 STIPULATION by parties For Dismissal Of Accident Fund Claims (dkm) [Entry date 11/15/90]

11/9/90 178 ORDER DISMISSING CLAIMS Of Plaintiff Accident Fund (1 pg) by Judge Richard A. Enslen pursuant to stipulation [177-1] to dismiss all claims between pltf Accident fund and defts with prejudice and without costs to any party (to dismiss case) (cc: all counsel) (dkm) [Entry date 11/15/90]

Docket as of December 16, 1993 10:54 am Page 1

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF MICHIGAN

ACCIDENT FUND, a Legal Entity Authorized by the Michigan Legislature Pursuant to 1912 PA 10 (First Extra Session) Part V, Sec. 1; 1915 LC 5477, WARD ELLISON and MAX GROST, Individually, ELSTON-RICHARD STORAGE COMPANY and RUSSELL JAMESON, Individually,

Plaintiffs,

File No. G81-224

v

NANCY A. BAERWALDT, Commissioner of Insurance of the State of Michigan, SILVERIA O. KANOYTON and JOHN HEUENI, LOREN MONROE, Treasurer of the State of Michigan, GERALD MILLER, Director of Management and Budget of the State of Michigan, and MICHIGAN CIVIL SERVICE COMMISSION,

Defendants.

_____/

ORDER DISMISSING CLAIMS OF PLAINTIFF ACCIDENT FUND

In accordance with a stipulation between Defendants and Plaintiff Accident Fund:

IT IS HEREBY ORDERED that all claims of Plaintiff Accident Fund are hereby dismissed with prejudice and without costs to any party.

Dated: Nov 9, 1990

/s/ Richard A. Enslen
RICHARD A. ENSLEN
U.S. District Judge

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GENESEE

MORRIS SOLOMON, d/b/a Solomon Sheet Metal Shop; ROBERT S. UNANGST, d/b/a Unangst & Son; and MOLYBOENUM UNLIMITED CO. INC., d/b/a Landmark Supermarket; Individually and on behalf of others similarly situated,

Plaintiffs,

v

MICHIGAN STATE ACCIDENT FUND; NANCY A. BAERWALDT, Commissioner of Insurance of the State of Michigan; STATE OF MICHIGAN, Department of State;

Defendants.
_____/

CC NO: 84-75763-CZ

JUDGE JUDITH A. FULLERTON

OPINION AND ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Plaintiffs purchased workers' compensation insurance through the Michigan State Accident Fund (hereinafter referred to as the "MSAF") during the prior six years (1978-1983). Plaintiffs seek in this action to represent as a class all such purchasers of workers' compensation insurance. Plaintiffs contend that the MSAF has a "surplus" which has grown from 16.5 million dollars at the end of 1977 to a figure now exceeding 112.7 million dollars. (See Plaintiffs' Complaint, paragraph 7) Plaintiffs

contend that the surplus is the product of illegal overcharges, exacted in violation of MCL 418.701; MSA 17.237(701), which provides in pertinent part that " . . . the accident fund shall assume charge of levying and collecting from the employers such premiums or assessments as may be necessary from time to time to pay the sums which become due under the provisions of this act and also the expense of administration"; and also in violation of MCL 418.711; MSA 17.237(711), which provides that the fund is to be "neither more nor less than self-supporting". Plaintiffs now seek to compel the insurance commissioner to effect a refund or distribution of this "surplus" back to the class which created it, leaving the MSAF with only a balance on hand actuarily sufficient to meet the operating expenses and to cover claims.

Plaintiffs claim to have a property right in both the "surplus" and in a "statutorily created expectancy that they would not be charged premiums in excess of those sums necessary to operate the fund and keep it solvent". (See Plaintiffs' Complaint, paragraphs 12 and 13) Plaintiffs further claim that a wrongful taking of their property occurred when they were initially charged allegedly grossly excessive premiums, that the Defendants are handling the surplus in such a way as to deprive Plaintiffs of their property as well as to impair their contract rights, and possibly in breach of said contracts. Plaintiffs also claim entitlement to an order distributing or refunding the fund surplus.

Defendants move for summary judgment pursuant to GCR 1963, 117.2(1), alleging that Plaintiffs have failed to state a claim upon which relief can be granted. Such a motion tests the pleadings alone. *Todd* v *Biglow,* 51 Mich

App 346 (1974). The motion should be granted only if the alleged claims are so clearly unenforceable, a matter of law that no factual development can possibly justify a right to recovery. *Vogh* v *American International Rent-A-Car,* 134 Mich App 362 (1984). Defendants so move on two distinct theories. First, Defendants allege Plaintiffs have failed to establish a property right in either a "statutorily created expectancy" that the Michigan State Accident Fund (MSAF) premiums would not exceed the amounts necessary to operate the MSAF on a break-even basis, or in the "surplus" of the MSAF itself. Second, Defendants assert that inasmuch as what Plaintiffs seek is an order from this Court commanding a State officer to take certain affirmative action, the relief sought is "mandamus", that a "mandamus" complaint in this instance must contain allegations showing:

1) that the insurance commissioner has a clear duty to effect a refund of the "surplus";

2) that Plaintiff has a clear legal right to compel such distribution; and

3) that the action sought, i.e. distribution, is ministerial in nature, *Wayne County* v *State Treasurer,* 105 Mich App 249, 251 (1981);

and that this Complaint fails to contain those allegations.

To the extent, if any, that Plaintiffs allege that a wrongful taking occurred as to the money Plaintiffs paid in an alleged overcharge of a premium, no one will gainsay that the premium money paid was initially Plaintiffs' property. Whether, if there was an overcharge, there was an unconstitutional taking of same must, however, be viewed in light of the fact that Plaintiffs chose voluntarily

the meet their obligations regarding workers' compensation insurance by participating in the MSAF. Since Plaintiffs were not compelled to participate, there was no "taking" in the constitutional sense. If Plaintiffs did not like the prospective relief feature of the MSAF program, they could go elsewhere. Plaintiffs bought and paid for insurance with a right to prospective relief only. The Court finds that Plaintiffs have failed in this regard to state a claim upon which relief can be granted.

Whether the analysis of Plaintiffs' Complaint for purposes of granting or denying Defendants' motion for summary judgment continues with the claimed unconstitutional taking of Plaintiffs' "expectancy" by the Fund's initially charging allegedly grossly excessive premiums [See Plaintiffs' Complaint, paragraph 7, 15, and 15(a)], *or* with the Defendants' alleged failure to effect readjustments of premiums or assessments levied upon member employers by declaring dividends to effect repayment of overcharges in proportion to the amounts paid in by the member employers [See Plaintiffs' Complaint, paragraph 15 and 15(b)], *or* with the alleged illegal "taking" by the alleged disbursement by dividends of the Fund surplus to a select few individuals in amounts out of proportion to that which was paid in by such persons [See Plaintiffs' Complaint, paragraph 15 and 15(c)], *or* by the granting of the benefit of the surplus in the form of rate reductions to persons who have not contributed anything toward the accumulation of the surplus thereby "taking" from Plaintiffs without just compensation [See Plaintiffs' Complaint, paragraph 15 and 15(c)], this Court must answer the following questions:

1) Whether Plaintiffs have a "property right" in the fund "surplus", or in what Plaintiffs characterize as "a statutorily created expectancy that they would be charged only such premiums as would be necessary to operate the fund and keep it solvent";

2) If so, to what, if anything, does the property right entitle Plaintiffs; and

3) Have Plaintiffs somehow been deprived of said property right by the action or inaction of defendants herein.

A "property interest" has been defined in *Board of Regents* v *Roth*, 408 US 564, 33 LEd 2d 548, 557 & 561; 92 S Ct 2701 (1972), wherein the Court has stated that:

> "[P]roperty interests . . . extend well beyond actual ownership of real estate, chattels, or money.
>
> . . .
>
> To have a property interest in a benefit a person clearly must have more than an unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.
>
> . . .
>
> Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as State law – rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." Id., at 571-572, 577.

Despite the MSAF's designation as a state agency by Federal Judge Enslen in *Accident Fund* v *Baerwaldt*, 545 F Supp 1030, 1037 (1982), and in the subsequent consent judgment, we must be mindful that the MSAF is but one of at least three alternatives from which this State's employers may choose to comply with their legal responsibilities under the Worker's Disability Compensation Act. Put another way, membership in the MSAF is not mandated by the State. It exists to provide coverage for losses sustained by employees of member employers. The member employers purchase a contract of insurance from the MASF. They purchase coverage for a financial consideration. They have a legitimate claim of entitlement to coverage for losses. MCL 418.701; MSA 17.237(701). There is no claimed deprivation of this right to coverage.

Plaintiffs also claim to and do have a right to a "statutorily-created expectancy of being charged only such premiums as would be necessary to operate the Fund and keep it solvent". This right entitles them administratively to challenge the rate structure (MCL 418.731; MSA 17.237(731); MCL 500.2420; MSA 24.12420), and if successful to obtain prospective relief – i.e., prospective rate reduction.

Assuming *arguendo* that the referenced statutorily created expectance is a "property right", it is a right founded in state law and accordingly the extent of the right is determined by state law. Our legislature has said that one who has been charged too high a premium by MSAF has the right to prospective premium adjustment. It has not afforded any other right to such a person. It is true, as contended by Plaintiffs, that once the State creates a property right, it may not provide constitutionally

inadequate procedural safeguards against the deprivation of the right. *Logan* v *Zimmerman*, 455 US 422, 71 LEd 2d 265, 275, 102 S Ct 1148 (1982). However, the starting point is the right itself. Here the right is to obtain prospective relief. In their Complaint, Plaintiffs do not challenge the constitutionality of Michigan's procedures to assure that those entitled to prospective relief receive it, and, thus, the issue raised in *Logan, supra,* is not presented. Plaintiffs do not claim deprivation of this property right. Accordingly, no claim has been stated for deprivation of this right.

Next, the Court will consider the possibility that Plaintiffs have a property right in the so-called fund surplus sufficient to compel a distribution of same. The importance of this possible property right cannot be downplayed, in view of the Complaint wherein Plaintiffs allege not only the accumulation of a considerable "surplus", but also that they are either being discriminated against by the Defendants' actions in selectively distributing dividends and/or in granting rate reductions, and/or that they have been deprived of their property without "due process of law". As pled, all of these claims are dependent upon Plaintiffs having a "property right" in the alleged surplus. The Court notes that due process has been recognized as being an elusive concept, its exact boundaries are undefinable and its content varied according to specific factual contexts. (See generally 16A Am Jur 2d, Constitutional Law §807.)

The facts pled in the Complaint must be taken as true for purposes of a GCR 1963 117.2(1) motion. The Court must therefore assume there is indeed a considerable

fund surplus and that fund officials are indeed dispensing dividends and/or rate reductions to some of the employer members. However, any possible property right must be "defined by existing rules or understandings that stem from an independent source such as state law . . . " *Board of Regents* v *Roth, supra.* Under MCL 418.711; MSA 17.237(711) "the premiums or assessments . . . shall be subject to readjustment by the commissioner as may become necessary." In addition, such a right must be further defined in this case by the fact that, as has been mentioned, fund participation is voluntary, and that upon dissolution any surplus is to be distributed through the Ingham County Circuit Court. MCL 418.751; MSA 17.237(751). There is nothing before this Court to show that recipients of dividends or rate reductions are receiving same for any reason or by any means other than through the process afforded by State law, whether by "readjustment" under MCL 418.711; MSA 17.237(711), or after a rate hearing under MCL 500.2420; MSA 24.12420, all of which processes are afforded to current members, and all of which would be afforded to former members upon reinstatement. The Complaint, read in the context of the applicable statutes, fails to state any claim upon which relief could be granted for denial of equal protection of the law.

Even were the Court to accord recognition under the doctrine of collateral estoppel [*U.S.* v *Mendoza*, ___ US ___; 78 LEd 2d 379; 104 S Ct ___ (1984)] to the finding of another Court, of a property right in the fund surplus, as Plaintiffs apparently seek to have this Court do based upon either Judge Enslen's reported decision in *Accident Fund* v *Baerwaldt*, 545 F Supp 1030 (1982), or the consent

judgment subsequently entered therein, this Court nevertheless finds Plaintiffs herein lack a *sufficient* property interest to be entitled to an order compelling Defendant Insurance Commissioner to distribute the fund surplus at this time. *Board of Regents, supra.*

A review of the pleaded facts in conjunction with applicable provisions of state law compels this Court to conclude that any right which Plaintiffs may have to a share of the "surplus" is, at best, only in the nature of a "future interest" upon dissolution. MCL 418.751; MSA 17.237(751). That is the most Plaintiffs could have expected when they became fund members and paid their premiums for each year of coverage, other than that to which they may become entitled subsequent to an administrative review of their premiums.

Defendants' motion for summary judgment, for failure to state a claim upon which relief can be granted, should therefore be and the same is hereby granted as to all claims other than contract claims.

Plaintiffs have not pointed to any contract language giving them a right to a dividend or rate reduction from an accumulated surplus. Defendants have appended the Affidavit of Eric Charles Nordman to establish the lack of any such contract language. No Counter-Affidavit has been filed, nor have Plaintiffs requested an opportunity to file an opposing affidavit. Therefore, as the Court does not believe any party has been misled as to the ground under which Defendants are moving for summary judgment, to the extent that Plaintiffs seek to ground their "property right" in contract, the Court finds there is no genuine issue as to the material fact that there is no such

language in the applicable contracts of insurance. Even under a theory of implied contract [*Perry* v *Sindermann*, 408 US 593, 33 LEd 2d 570, illegible, 92 S Ct 2694 (1972)], no facts to establish a property right grounded in contract have been pled or shown. There being no relevant contractual rights established, there is no foundation, and no claim stated, for unconstitutional impairment of contract rights. Summary judgment under GCR 1963, in part under 117.2(3) and in part under 117.2(1) should therefore be, and the same is hereby granted on any contract claim.

Finally, the Court finds the Complaint seeks relief in the nature of mandamus," and that Plaintiffs have failed therein to plead facts demonstrating entitlement to such relief. *Wayne County* v *State Treasurer*, 105 Mich App 249 (1981). Additionally, this Court notes that in *Accident Fund, supra*, 1037, the Commissioner of Insurance illegible found to have been vested with "an exceptional and pervasive degree of discretionary authority over all facets of the operation of this Fund . . . " For these reasons, also, Defendants' motion for summary judgment should be, and the same is accordingly hereby granted.

DATED: August 31, 1984

/s/ Judith A. Fullerton
JUDITH A. FULLERTON
Circuit Judge

William Chenoweth
David Melkus

STATE OF MICHIGAN
COURT OF CLAIMS

FUN 'N SUN RV, INC., et al.,
Plaintiffs,

v

STATE OF MICHIGAN AND ACCIDENT FUND DIRECTOR,
Defendants.
_____/

Hon. Thomas L. Brown
Case No. 93-15051-CM

AFFIDAVIT OF JOHN EMERICK

STATE OF MICHIGAN)
) ss.
COUNTY OF SAGINAW)

John W. Emerick, being first duly sworn, deposes and says as follows:

1. I have personal knowledge of the facts described below, and if sworn could competently testify thereon at trial.

2. I am an owner of a company called Tittabawassee Investment Co., which has been a policyholder of the Michigan Accident Fund since 1973. It is my understanding, based on conversations with Accident Fund agents, as well as the policies I was given, that the Accident Fund would provide worker's compensation insurance to me at the lowest possible cost and that the Accident Fund was being operated on a nonprofit basis. Specifically, it was my understanding that if the premiums collected were greater than the costs necessary to provide the insurance

and operate the Accident Fund, any sums surplus to the business needs of the Accident Fund would be returned to the policyholders in the form of premium dividends or refunds.

4. I was very surprised to read in the newspapers that the State of Michigan would realize a $291 million windfall upon selling the Accident Fund to Michigan Blue Cross and Blue Shield. The fact that the State of Michigan is attempting to take this money is inconsistent with my understanding as to who would receive the benefits from the Accident Fund.

5. I contacted the law firm of Law, Weathers & Richardson without being solicited or contacted by it. The purpose of my communication was to express the sentiments expressed in this Affidavit and encourage Law, Weathers & Richardson to vigorously pursue this matter.

/s/ John W. Emerick
John W. Emerick

The foregoing instrument was acknowledged before me this 23rd day of February, 1995, by John W. Emerick.

/s/ Cynthia Eigner

Notary Public, Bay County, Michigan
My commission expires: 3-3-99

STATE OF MICHIGAN
COURT OF CLAIMS

FUN 'N SUN RV, INC., et al.,
Plaintiffs,

v

STATE OF MICHIGAN AND ACCIDENT FUND DIRECTOR,
Defendants.
_____/

Hon. Thomas L. Brown
Case No. 93-15051-CM
PROOF OF SERVICE

STATE OF MICHIGAN)
) ss.
COUNTY OF KENT)

Jayne Germain, being first duly sworn, deposes and says that she is a secretary with the law firm of Law, Weathers & Richardson, P.C., and that on March 1, 1995, she served a true copy of the Affidavit of John Emerick in support of Plaintiffs' Brief in Opposition to Defendants' Summary Disposition Motion and in Support of Their Own Summary Disposition Motion upon George H. Weller, Assistant Attorneys General, Accident Fund Division, P.O. Box 40790, Lansing, Michigan, by first class mail, postage fully prepaid.

/s/ Jayne Germain
Jayne Germain

Subscribed and sworn to before me on March 1, 1995.

/s/ Lynne Barber
Lynne Barber
Kent County, Michigan
My commission expires: 7-7-97.

(LOGO)

STATE OF MICHIGAN
OFFICE OF THE GOVERNOR
LANSING

JOHN ENGLER
GOVERNOR

IN THE SUPREME COURT OF THE STATE OF MICHIGAN

Executive Message Of John Engler, Governor

To: The Honorable Chief Justice and Associate Justices of the Michigan Supreme Court

John M. Engler, Governor of the State of Michigan, under Michigan Court Rule 7.305(A), respectfully advises the Court as follows:

There is presently pending in the Court of Claims the case of

Fun 'N Sun R.V., Inc., et al

v

State of Michigan, et al
File No. 93-15051-CM

This action challenges the constitutionality of the act to revise and consolidate the laws relating to workers' disability compensation, 1993 PA 198. The challenged portion of the Act, MCL 418.701a; MSA 17.237 (701a), permits the sale of the State Accident Fund with the consideration for the sale going to the state. The challenged Act also requires that the sale be completed by December 31, 1994.

In his Opinion of March 9, 1994, denying a summary disposition motion by the state, the Court of Claims Judge has already held that plaintiffs, "the policyholders of the Accident Fund have a vested right to the assets, monies and surpluses of the Accident fund." This interpretation, if sustained, would cause funds derived from the sale to be paid to the policyholders rather than the state.

Furthermore, this interpretation renders MCL 418.701a; MSA 17.237 (701a), unconstitutional pursuant to Const 1963, Art 1, §10, Art 1, §17, Art 9, §18 or Art 4, §30.

I believe this issue involves a controlling question of public law which is of such public moment as to require an early and final determination by the Supreme Court. The question is:

> Is that portion of 1993 PA 198; i.e. MCL 418.701a; MSA 17.237 (701a), which makes that consideration for the sale of the State Accident Fund the property of the state, constitutional and in conformance with the law?

The answer to this question is of great public importance because of the time constraints set by the Legislature, December 31, 1994. Numerous steps are required by the law to consummate the sale of the Accident Fund, prior to that deadline. It is also of great public importance because of its significant impact to the budget of the state. Decisions are already being made by the legislature regarding expenditure of the proceeds of the sale.

Therefore, pursuant to Michigan Court Rule 7.305(A), by this Executive Message, I respectfully request that the Supreme Court authorize the Court of Claims to certify

the question to the Supreme Court for immediate determination. The resolution of this question will resolve most of the issues in the action. Any unresolved issues will not prevent the sale from being completed.

So that this issue may be decided at the earliest moment, I further urge this Court to expedite the hearing of the question by scheduling an early briefing and argument during the Court's present term.

Respectfully submitted,

/s/ John M. Engler
John M. Engler, Governor

May 6, 1994